TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 341

WILLIAM EARL DODGE AND JOSHUA T. DODGE, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1926

CERTIORARI GRANTED MAY 10, 1926

(31,855)

(31,855)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, first circuit		
Caption	1	1
Record from district court of the United States, district of Rhode Island	1	
Caption	1	1
Petition for leave to file bill of information and order allowing same	2	
Libel of information	2	1
Warrant and monition and marshal's return	2	1
Lien claim of mortgage	5	4
Claim of owners	7	5
Motion to dismiss	7	6
Answer	8	6
Argument and submission on motion to dismiss	9	7
Opinion, Brown, J.	10	8
Final decree	10	8
Stipulation extending time	16	13
Petition for appeal	16	14
Assignments of error	17	14
Citation and service	18	14
Clerk's certificate	19	
Opinion, Bingham, J.	21	
Final decree	23	16
Motion and order staying mandate	26	18
Clerk's certificate	26	19
Order allowing certiorari	27	
	28	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 12, 1926

[fol. 1] [Captions omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, DISTRICT OF RHODE ISLAND

Adm. No. 1570

UNITED STATES OF AMERICA

vs.

Motor Boat "RAY OF BLOCK ISLAND"

PETITION FOR LEAVE TO FILE LIBEL OF INFORMATION AND ORDER ALLOWING SAME—Filed March 5, 1925

This was a Libel of Information filed by the United States District Attorney for this District under Section 26, Title II, National Prohibition Act, in the words and figures following:

To the Honorable Arthur L. Brown, United States District Judge for the District of Rhode Island:

I, Norman S. Case, United States Attorney for said District, respectfully petition said Honorable Court for leave to file the accompanying libel of information against Motor Boat "Ray of Block Island."

Norman Stanley Case, United States Attorney.

Libel of information may be filed and process issue returnable March 23, 1925.

Arthur L. Brown, J., March 5, 1925.

IN UNITED STATES DISTRICT COURT

LIBEL OF INFORMATION

To the Honorable Arthur L. Brown, United States District Judge for the District of Rhode Island:

The libel of the United States of America, by Norman S. [fol. 3] Case, United States Attorney for the District of

Rhode Island, against the Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture, who prosecutes for and on behalf of the United States and respectfully represents and shows to the court:

I. That heretofore, to wit, the 18th day of April, A. D. 1924, Lt. L. P. Pelrine of the Police Force of the City of Providence, in said District and a number of police officers, acting under his control and direction, discovered one Joshua Trueman Dodge in the act of transporting in violation of Title II, Sections 3 and 26 of the National Prohibition Act, a large quantity of intoxicating liquor, in a certain water craft, to wit, a motor boat bearing the name "Ray of Block Island," Registration No. G 87, in certain navigable waters of the United States, to wit, on the Providence River, so called, alongside the dock of the Saconnet Coal Company, so called and near Allens Avenue, in said City and County of Providence, in said District and within the jurisdiction of this Honorable Court.

II. That the said police officers then and there seized said intoxicating liquors and said Motor Boat "Ray of Block Island," and arrested said Joshua Trueman Dodge, said Dodge being then and there in possession and charge of said Motor Boat; that subsequently said Dodge was arrested by United States officers.

III. That the said Joshua Trueman Dodge, heretofore, to wit, the 10th day of December, A. D. 1924, was duly convicted in said District Court of the offense of transporting intoxicating liquor in violation of Title II, Section 3 of the National Prohibition Act, was sentenced to pay and did pay a fine of $500.00, said offense being the offense described in paragraph I hereof.

[fol. 4] IV. That the said Motor Boat "Ray of Block Island" was delivered to Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island and is now in the custody of said Harry G. Sheldon in Pawtuxet Cove in Providence County, in said District and within the jurisdiction of this Honorable Court.

That by reason of the foregoing premises and under and by virtue of the provisions of Title II, Section 26 of

the National Prohibition Act, said Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture became and is forfeited to the use of the United States as in said statute made and provided, and is subject to condemnation and sale, the proceeds thereof to be paid into the Treasury of the United States.

Wherefore your libellant prays that this Honorable Court enter a decree of condemnation against said Motor Boat "Ray of Block Island" to the use of the United States; that said Motor Boat "Ray of Block Island" shall be sold at public auction; that all bona fide liens which are established shall, after deducting all expenses, fees and costs, be paid and that the balance of the proceeds shall be paid into the Treasury of the United States as miscellaneous receipts.

Your libellant further prays that the usual process and monition of this Honorable Court issue in this behalf, and that all persons interested in said property may be cited and admonished in general and special to appear and answer the premises.

Norman Stanley Case, United States Attorney.

Norman Stanley Case, being duly sworn, on oath deposes and says; that he is the United States Attorney for the District of Rhode Island; that he has read the foregoing libel; that the same is true to the best of his information, knowledge and belief; that the reason why this verification is made [fol. 5] by the deponent and not by the libellant is that the libellant is a corporation sovereign.

Subscribed and sworn to before me this 5th day of March, A. D. 1925, at Providence, R. I. Harold A. Andrews, Notary Public.

In United States District Court

Warrant and Monition and Marshal's Return—Issued March 5, 1925

The President of the United States of America to the Marshall for the District of Rhode Island or to his Deputy, Greeting:

Whereas, a libel hath been filed in the District Court of the United States for the District of Rhode Island, on the 5 day of March, A. D. 1925, by United States of America, by its proctor, Norman S. Case, United States Attorney for the District of Rhode Island, against the Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture in a cause of condemnation and forfeiture under the Navigation Customs and Revenue Laws of the United States and the National Prohibition Act for the reasons and causes in said Libel mentioned, and praying the usual process and monition of the said court, in that behalf to be made, and that all persons interested in the said Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture may be cited in general and special to answer the premises, and all proceedings being had, that the said Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture may, for causes in said libel mentioned, be condemned and sold as prayed for in said libel.

[fol. 6] You are therefore commanded to attach said Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture and to detain the same in your custody until further order of court and to give due notice to all persons claiming the same or having anything to say why the same should not be sold pursuant to the prayer of said libel, that they appear before said court to be held at Providence, in and for said District, on the 23 day of March A. D. 1925 at 10 o'clock A. M., then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Hon Arthur L. Brown, Judge of said court at Providence, this 5 day of March, A. D. 1925.

Alice Peckham, Clerk. (L. S.)

Marshal's Return

At Pawtuxet, R. I., March 6, 1925.

In obedience to the within monition, I attached the said Motor Boat "Ray of Block Island," etc., and have given due notice to all persons claiming the same, by advertising the substance of this monition in the Providence Journal, March 7, 14, and 21, and by posting a certified copy thereof on the bulletin board of the Federal Court.

William R. Rodman, U. S. Marshal. Patrick J. Pyne, Deputy.

Fees:

Service	$2 00
Travel	42
Copy and Posting	1 30
Advertising	8 64
Custody	598 00
	$610 36

up to Aug. 20, 1925, date of Appeal.

[fol. 7] In United States District Court

Lien Claim of Mortgagee—Filed April 6, 1925

And now comes Phebe Ray Dodge of the Town of New Shoreham, County of Newport and State of Rhode Island, and by her authorized attorney files this her claim for said motor boat "Ray of Block Island" and intervening in accordance with the provisions of Section 26 of the National Prohibition Act says that she has a just claim and lien against said vessel in the amount of three thousand dollars represented by a mortgage of record which she prays leave to introduce as proof thereof; wherefore she moves that an order be entered by this Honorable Court either establishing her lien on said vessel or ordering the release of said vessel into her custody because of the improbability of the sale price on forfeiture bringing a sum sufficient to pay said lien and the Government charges against said vessel.

Phebe Ray Dodge, by Her Attorney, Daniel T. Hagan.

In United States District Court

Claim of Owners—Filed as of April 7, 1925

Now comes William Earl Dodge and Joshua T. Dodge, of the Town of New Shoreham, in the County of Newport and State of Rhode Island, and by their authorized attorney, Peter W. McKiernan, file this their claim of ownership of the said vessel, and protesting that the taking over of the said Motor Boat by the Federal Prohibition Agents from [fol. 8] the police officers by whom said boat was seized, was in violation of law and, without waiving any of their rights which they may have under the laws of the United States of America, being compelled to make the admissions herein for the purposes of recovering their property so seized as aforesaid, claim that they are the true and lawful owners of the said vessel, her engines, tackle, apparel and furniture, and pray that they may be permitted to appear in that certain libel numbered 1570 filed against said vessel and to defend the same; and further pray that this Court grant them an order to release said vessel, her engines, tackle, apparel and furniture.

William Earl Dodge, Joshua T. Dodge, by Their Attorneys, Peter W. McKiernan.

Enter. Arthur L. Brown. July 25, 1925.

Entered as of April 7, 1925, by order of Court.

In United States District Court

Motion to Dismiss—Filed April 7, 1925

To the Honorable the Judges of the District Court of the United States in and for the District of Rhode Island:

And now come William Earl Dodge and Joshua T. Dodge of the Town of New Shoreham, County of Newport and State of Rhode Island, and move that said libel be dismissed and as cause therefore say:

1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without author-

ity and is not recognized by a subsequent surrender of the vehicle to federal officers.

[fol. 9] 2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.

3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

By Their Attorney, Peter W. McKiernan.

In United States District Court

Answer—Filed April 7, 1925

To the Honorable the District Judges of and for the District Court of the United States in and for the District of Rhode Island:

Joshua T. Dodge, of the Town of New Shoreham, County of Newport and State of Rhode Island, owner and claimant of Motor Boat "Ray of Block Island," her engines, tackle, apparel and furniture, as the same are proceeded against by the libel of the United States of America in a cause of forfeiture, admiralty and maritime, answers said libel:

First. The claimant admits the allegations in the first article of said libel.

Second. The claimant admits the allegations in the second article of said libel.

Third. The claimant admits the allegations in the third article of said libel.

Fourth. The claimant admits the allegations in the fourth article of said libel.

Fifth. The claimant denies the allegations in the fifth article of said libel.

Joshua T. Dodge, by His Attorney-in-fact, Peter W. McKiernan.

[fol. 10] At Providence, County of Providence and State of Rhode Island, this 7th day of April, A. D. 1925, personally appeared before me, Catherina H. McKiernan, a notary

public in and for said State of Rhode Island, Peter W. McKiernan, to me known and known by me to be the attorney in fact of said Joshua T. Dodge, claimant, and he made oath to the foregoing answer and facts therein set forth and acknowledged said facts related of his own knowledge to be true and those set forth upon information and belief to be true to the best of his knowledge and belief.

Catherina H. McKiernan, Notary Public.

IN UNITED STATES DISTRICT COURT

ARGUMENT AND SUBMISSION ON MOTION TO DISMISS

Thereafter, to wit, on July 24, 1925, the case was called for hearing on the claimants' Motion to Dismiss and was fully heard and argued by counsel for the respective parties, and was held for advisement, and on July 31, 1925, the Opinion of the Court granting claimants' Motion to Dismiss Libel was announced.

IN UNITED STATES DISTRICT COURT

OPINION—Announced July 31, 1925

BROWN, J.:

The libel is as follows:

"The libel of the United States of America, by Norman S. Case, United States Attorney for the District of Rhode Island, against the Motor Boat 'Ray of Block Island,' her engines, tackle, apparel and furniture, who prosecutes for and on behalf of the United States and respectfully represents and shows to the court:

I. That heretofore, to wit, the 18th day of April, A. D. 1924, Lt. L. P. Pelrine of the Police Force of the City of [fol. 11] Providence, in said District and a number of police officers, acting under his control and direction, discovered one Joshua Trueman Dodge in the act of transporting in violation of Title II, Section 3 and 26 of the National Pro

hibition Act, a large quantity of intoxicating liquor, in a certain water craft, to wit, a motor boat bearing the name 'Ray of Block Island,' Registration No. G-87, in certain navigable waters of the United States, to wit, on the Providence River, so called, alongside the dock of the Saconnet Coal Company, so called and near Allens Avenue, in said City and County of Providence, in said District and within the jurisdiction of this Honorable Court.

II. That the said police officers then and there seized said intoxicating liquors and said Motor Boat 'Ray of Block Island' and arrested said Joshua Trueman Dodge, said Dodge being then and there in possession and charge of said Motor Boat; that subsequently said Dodge was arrested by United States officers.

III. That the said Joshua Trueman Dodge, heretofore, to wit, the 10th day of December, A. D. 1924, was duly convicted in said District Court of the offense of transporting intoxicating liquor in violation of Title II, Section 3 of the National Prohibition Act, was sentenced to pay and did pay a fine of $500.00 said offense being the offense described in paragraph I hereof.

IV. That the said Motor Boat 'Ray of Block Island' was delivered to Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island and is now in the custody of said Harry G. Sheldon in Pawtuxet Cove in Providence County, in said District and within the jurisdiction of this Honorable Court.

That by reason of the foregoing premises and under and by virtue of the provisions of Title II, Section 26 of the National Prohibition Act, said Motor Boat 'Ray of Block Island,' her engines, tackle, apparel and furniture became [fol. 12] and is forfeited to the use of the United States as in said statute made and provided, and is subject to condemnation and sale, the proceeds thereof to be paid into the Treasury of the United States.

Wherefore your libellant prays that this Honorable Court enter a decree of condemnation against said Motor Boat 'Ray of Block Island' to the use of the United States; that said Motor Boat 'Ray of Block Island' shall be sold at public auction; that all bona fide liens which are established

shall, after deducting all expenses, fees and costs, be paid and that the balance of the proceeds shall be paid into the Treasury of the United States as miscellaneous receipts.

Your libellant further prays that the usual process and monition of this Honorable Court issue in this behalf, and that all persons interested in said property may be cited and admonished in general and special to appear and answer the premises.

Norman Stanley Case, United States Attorney."

By answer the claimant admits the allegations of the first, second, third and fourth articles of the libel but denies that by reason of the facts stated in articles one to four inclusive the motor boat "Ray of Block Island" is subject to forfeiture under Title II, Section 26 of the National Prohibition Act.

The Motion to Dismiss is as follows:

"And now come William Earl Dodge and Joshua T. Dodge of the Town of New Shoreham, County of Newport and State of Rhode Island, and move that said libel be dismissed and as cause therefor say:

1. That the National Prohibition Act confines the duty of seizure of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to federal officers.

[fol. 13] 2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.

3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

By Their Attorney Peter W. McKiernan."

The claimant relies upon the decisions of the Circuit Court of Appeals for the Ninth Circuit, U. S. v. Loomis, 297 Fed. 359, March 28, 1924; U. S. v. Thomas, 297 Fed. 362, March 28, 1924.

The United States relies upon the decision of the Circuit Court of Appeals for the Fifth Circuit, U. S. v. Story, 294 Fed. 517, Nov. 30, 1923. This decision was brought to the attention of the Circuit Court of Appeals for the Ninth Circuit as appears from its comment, 297 Fed. 362:

"We have given careful consideration to the opinion in U. S. v. Story (C. C. A.) 294 Fed. 517, where the court held that Sec. 26, supra, was broad enough to confer authority upon state, as well as federal officers; but necessity of adherence to the rule of strict construction constrains us to hold that the police authorities were not empowered to make the seizure."

It is conceded that the state law of Rhode Island conferred no authority to seize any boat or vehicle found transporting intoxicating liquor.

In Carroll et al. v. U. S., 267 U. S. 132 at page 155 it was said:

"Under Section 28, Title II, of the Prohibition Act the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act [Fol. 11] are therefore protected by Section 970 of the Revised Statutes, providing that:

"'When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.'

"It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by showing that he had reasonable or probable cause for the seizure. Stacey v. Emery, 97 U. S., 642."

It is perhaps significant that the protection afforded by Sec. 28 of the Prohibition Act is confined to the "commis-

sioner, his assistants, agents and inspectors, and all other officers of the United States, whose duty is to enforce criminal laws."

It is also significant that Sec. 26 prescribes duties of "any officer of the law"; "it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law;" as well as "take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance," etc.

While a statute of the United States may provide that action may be taken by state officers in aid of a federal statute, it is doubtful if a federal statute can impose upon a state officer a positive duty of that kind. At least we [fol. 15] should be disinclined to construe a statute imposing a duty upon "any officer of the law" to include other officers than those of the United States. We should at least require unambiguous language to support such a construction.

It is reasonable to say that Sec. 28 should be construed in conjunction with Sec. 26 and that only officers who are granted the powers and protection under Sec. 28 are intended to be charged with the positive duty under Sec. 26. Furthermore, the provisions concerning the approval of bonds by said officer seem inappropriate when applied to police officers of a city.

In U. S. v. Loomis, 297 Fed. 359 at page 362 it was said as to the applicability of Sec. 1014 of the Revised Statutes that it

"pertains to the mode or process relative to procedure by which an officer may be arrested, imprisoned, or bailed, but in our opinion does not affect a procedure in the federal court which has to do with an inquiry into the legality of the seizure and forfeiture of his property.

Roth v. United States (C. C. A) 294 Fed. 475."

I am unable to see that R. S. Sec. 1014 affords support to a broad construction of the words "any officer of the law," contained in Sec. 26, which includes police officers of a city.

As there are conflicting decisions by Courts of Appeals, this court can follow but one of these decisions. It seems to me that the later decision in U. S. v. Loomis, 297 Fed. 359, is sufficient authority upon which to sustain the claimant's Motion to Dismiss. While Article IV of the libel is in gen-

eral terms and does not give the date of the delivery of the boat to the federal prohibition director, it was stated at the bar that upon the seizure of the boat by the police, the liquors were removed therefrom by the police and that at the time of her delivery to the federal prohibition direc- [fol. 16] tor she had been unladen. The present case, therefore, is not affected by any previous rulings in cases where police officers had stopped a laden vehicle on the highways and notified prohibition officers who made seizure of the vehicle while still laden and while the liquor was still in the process of transportation, though temporarily stopped upon the highway.

Motion to Dismiss granted. A draft decree may be presented accordingly.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—August 1, 1925

This cause came on to be heard upon the libel answer thereto and motion of the claimants Joshua Trueman Dodge and William Earl Dodge to dismiss said libel, and it appearing to the satisfaction of the court; that said claimants are entitled to possession of said boat, it is therefore ordered, adjudged and decreed that William R. Rodman, United States Marshal deliver said motor boat "Ray of Block Island" to said claimants.

Warrant of delivery to issue ten days after the date hereof unless notice of appeal is filed.

Arthur L. Brown, J., U. S. District Judge.

Enter: August 1, 1925. By order to—

Alice Peckham, Clerk.

Assented to as to form.

Harold A. Andrews, Asst. U. S. Atty.

In United States District Court

Stipulation Extending Time—Filed August 10, 1925

Time for issuance of warrant of delivery further extended to August 20, 1925.

[fol. 17] Peter W. McKiernan, Attorney for Claimant.
Harold S. Andrews, Attorney for Libellant.

Enter: August 10, 1925. Arthur L. Brown, J.

In United States District Court

Petition for Appeal—Filed August 20, 1925

Now comes the United States of America, Libellant, conceiving itself aggrieved by the final decree heretofore entered in this cause on the 1st day of August, A. D. 1925, as more specifically specified in the assignment of errors herewith filed, hereby appeals from said final decree to the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in said assignment of errors and prays that an appeal may be allowed and that a transcript of the record and proceedings in this cause may be sent to the said United States Circuit Court of Appeals for the First Circuit, and that upon the allowance of said appeal said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said decree and the issuance of a warrant of delivery.

By Its Proctor, Harold A. Andrews, Assistant United States Attorney, Proctor for Libellant.

Appeal allowed and to act as a supersedeas. Arthur L. Brown, J. August 20, 1925.

[fol. 18] In United States District Court

Assignments of Error—Filed August 20, 1925

And now comes the United States of America, Libellant, and makes and files this its assignment of errors:

(1) The District Court of the United States for the District of Rhode Island erred in entering the final decree delivering the vessel to the claimants.

(2) The District Court of the United States for the District of Rhode Island erred in granting claimants' motion to dismiss the libel.

(3) The District Court of the United States for the District of Rhode Island erred in holding that the libel did not state a cause for forfeiture.

(4) The District Court of the United States for the District of Rhode Island erred in holding as implied by said final decree that a forfeiture of a vehicle or vessel under Section 26, Title II of the National Prohibition Act can be decreed only where officers of the United States discover the person in charge of the vehicle or vessel in the act of transportating intoxicating liquor in violation of the law.

(5) The District Court of the United States for the District of Rhode Island erred in holding as implied by said final decree that a forfeiture of a vehicle or vessel under Section 26, Title II of the National Prohibition Act can be decreed only upon discovery, seizure and arrest by officers of the United States.

Wherefore the United States of America, Libellant, prays that the final decree of the District Court of the United States for the District of Rhode Island be reversed.

By Its Proctor, Harold A. Andrews, Assistant United States Attorney, Proctor for Libellant.

[fols. 19 & 20] Citation, in usual form, showing service on Peter W. McKiernan and Daniel T. Hagan, omitted in printing.

[fols. 21 & 22] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 23] In United States Circuit Court of Appeals for the First Circuit, October Term, 1925

No. 1888

Motor Boat Ray of Block Island, United States of America, Libellant, Appellant,

v.

William Earl Dodge et al., Appellees

Appeal from the District Court of the United States for the District of Rhode Island

Before Bingham, Johnson, and Anderson, JJ.

Opinion—Filed March 3, 1926

Bingham, J.:

This is a libel of information filed by the United States on March 5, 1925, in the federal District Court for Rhode Island against the Motor Boat Ray of Block Island for forfeiture under Section 26, Title II, of the National Prohibition Act.

In the libel it is alleged in substance: (1) that on the eighteenth day of April, 1924, police officers of the City of Providence discovered the claimant, Joshua Trueman Dodge, in the act of transporting, in violation of the National Prohibition Act, a quantity of intoxicating liquor in the motor boat within said District; (2) that said officers then and there seized the liquors and motor boat and arrested said Dodge, who was in charge of the motor boat, [fol. 24] and that subsequently said Dodge was arrested by United States officers; (3) that said Dodge, on the tenth day of December, 1924, was duly convicted in said District Court of the offence of unlawful transportation for which he had been arrested; (4) that, after the seizure, the motor boat was turned over to the Federal Prohibition Director for said District and was, at the time the libel was filed, in his possession; and (5) that by reason of the premises the motor boat became forfeited.

On this libel the usual warrant and monition were issued and duly served.

The claimants filed a motion to dismiss, as follows:

"1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to federal officers.

"2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.

"3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession."

On the same day the claimants filed an answer admitting the allegations of the libel but denying that they constituted cause for forfeiture.

After hearing the District Judge filed an opinion granting the motion to dismiss on the ground that Section 26 of the National Prohibition Act, read in connection with other provisions of the Act, did not confer authority upon officers other than those of the United States to enforce the provisions of said section, following the decisions in the Ninth Circuit of United States v. Loomis, 297 Fed. 359; and United States v. Thomas, 297 Fed. 362, it being conceded that the law of the State of Rhode Island conferred no authority to seize a vehicle or boat found transporting intoxicating liquors, and that, at the time the Ray was turned over to the Federal Prohibition Director all liquors previously found upon her by the police had been removed.

We agree with the decision of the court below as to the [fol. 25] construction of Section 26 of Title II of the Prohibition Act that it confers authority only upon United States officers but are of the opinion that it erred in dismissing the libel, as the United States, in taking over the vessel and filing the libel to enforce a forfeiture, ratified and adopted the acts of the police officers and thereby rendered the seizure lawful under Section 26, as the boat, at the time the seizure was made, was engaged in the unlawful transportation of intoxicating liquors. It is conceded that the circumstances attending the seizure would have rendered it lawful had it been made by federal officers, and we are of the opinion that it is equally so, the United States

having adopted the acts of the police officers in making the seizure.

In The Caledonian, 4 Wheat. 99, 101, Judge Story, speaking for the court, said:

"It is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command."

See also Wood v. United States, 16 Pet. 341; Taylor v. United States, 3 How. 197; United States v. Story, 294 Fed. 517; United States v. One Studebaker Seven-Passenger Sedan, 4 Fed. (2d) 534; The G. 883, 6 Fed. (2d) 416.

The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[fol. 26] On January 5, 1926, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

In United States Circuit Court of Appeals

Final Decree—March 3, 1926.

This cause came on to be heard January 5, 1926, upon the transcript of record of the District Court of the United States for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 3, 1926, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

In United States Circuit Court of Appeals

Motion and Order Staying Mandate—Filed March 29, 1926

Now comes William Earl Dodge et al., appellees, in the above-entitled cause and represent to this Honorable Court that they intend to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore, the said William Earl Dodge et al., appellees, move that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme Court of their petition for said writ, or until the further order of this court.

William Earl Dodge et al., Appellees, by Their Attorney, Daniel T. Hogan.

[fol. 27] On the same day, to wit, on March 29, 1926, the following Order of Court was entered:

Order of Court—March 29, 1926

Upon motion of appellees, it is ordered that the mandate herein be, and the same hereby is, stayed until further order of court, upon the condition that said appellees file, within twenty days, a petition for writ of certiorari in the Supreme Court of the United States.

By the Court.

Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 28] In Supreme Court of the United States

Order Allowing Certiorari—Filed May 10, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
OCT 4 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 341.

WILLIAM EARL DODGE AND JOSHUA T. DODGE,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONERS.

DANIEL T. HAGAN,
PETER W. McKIERNAN,
Counsel for Petitioners.

INDEX.

	Page
Brief for the petitioners	1
Statement of fact	1
Specification of errors	4
Question presented	4
Statute involved	4
Argument	5
Point I. Conflicting law	6
Point II. Construction of statutes	6
Point III. Prize law	20
Point IV. Transportation	29
Point V. Officers	32
Point VI. Search and seizure	33
Point VII. Adoption	38
Point VIII. Forfeitures	41
Point IX. Miscellaneous	42
	43

TABLE OF CASES CITED.

Board of Police Commissioners v. Wagner, 93 Md., 182 ..... 41, 43
Bolles v. Outing Co., 175 U. S., 262; 20 S. C. R., 91; 44 L. Ed., 156 25
Boyd v. United States, 116 U. S., 616 20
"Buena Venture," The, 87 Fed., 927, 929 31
Carroll et al. v. United States, 267 U. S., 132 ..... 11, 44
"Caledonian," The, 4 Wheat., 100; 4 L. Ed., 523 ..... 10, 13, 31, 35, 42
Cliquot's Champagne, 3 Wall., 114, 145 27
Farmers', &c., Nat. Bk. v. Dearing, 91 U. S., 29, 35; 23 L. Ed., 196 26
"G-883," The, 6 F. (2d), 416 13
Gelston v. Hoyt, 3 Wheat., 246; 4 L. Ed., 381 ..... 10, 17
Kanellos v. United States, 282 Fed., 461 35
Keene v. United States, 300 Fed., 493 38
Lamar, Executor, v. Browne, 92 U. S., 187-194 31
Manila Prize Cases, 188 U. S., 254 30
Marron v. United States, 8 Fed. (2d), 251 37
McLoughan v. Mitchell, 126 N. C., 683 27
"Missouri," The, 17 Fed. Cas., 479; Case No. 9652 ..... 19, 44
Pelham v. Rose, 76 U. S. (9 Wall.), 103 44
Re Swann, 150 U. S., 637; 37 L. Ed., 1207; 14 S. C. R., 225 28

Page

Robinson v. United States, 292 Fed., 683 31
Roth v. United States, 294 Fed., 455 ..... 9, 40
Skinner v. Thomas, 171 N. C., 98 27
Slocum v. Mayberry, 2 Wheat., 1 41
Smithwick v. Williams, 30 N. C., 268 27
Stacey v. Emery, 97 U. S., 642 42
State v. Charasky, 122 Me., 285 32
Taylor v. United States, 3 How., 197 ..... 13, 19, 42
Todd v. United States, 158 U. S., 278; 15 S. C. R., 889; 29 L. Ed., 982 24
Trathe Truck Sales Co. v. Justice Ct., 192 Cal., 377 41
United States v. American Brewing Co., 206 F., 772 28
United States v. Falloco, 277 Fed., 75 37
United States v. Franzione, 286 Fed., 769 39
United States v. Hydes, 267 Fed., 470 ..... 22, 33, 38, 43
United States v. Loomis, 297 Fed., 359 ..... 8, 33, 43
United States v. One Cadillac 8 Automobile, 255 Fed., 453 .. 24, 29, 42
United States v. One Reo Motor Truck, 6 F. (2d), 412 .. 29, 35, 39, 43
United States v. One Studebaker Seven Passenger Sedan, 4 F. (2d), 531 ..... 13, 29, 35, 39, 43
United States v. Padelford, 76 U. S. (9 Wall.), 531 540 31
United States v. Paul, 6 Peters, 141; 8 L. Ed., 348 25
United States v. Sheldon, 2 Wheat., 119; 4 L. Ed., 199 25
United States v. Slusser, 270 Fed., 818 ..... 22, 33, 39
United States v. Story, 294 F., 547 ..... 6, 43
United States v. Stowell, 133 U. S., 11; 10 Sup. Ct., 244; 33 L. Ed., 555 ..... 21, 26
United States v. Sylvestre, 273 Fed., 253 42
United States v. The Cora, 46 N. W., 503 38
United States v. Thomas, 297 Fed., 362 ..... 35, 43
United States v. Two Hundred and Sixty seven Gold Pieces and One McLaughlin Automobile, 255 Fed., 217 22
Wood v. United States, 16 Peters, 341 ..... 13, 20, 42

OTHER AUTHORITIES CITED.

Act of Congress, March 3, 1899 (Chapter 413, Sec. 13; 30 Stat., 1007) 30
Act of Congress, July 5, 1884 (23 Stat., 118; Comp. St., Sec. 4290) 34
Act of Congress, September 13, 1888 (25 Stat., 479; Comp. St., Sec. 4313) 34, 48
Act of Congress, March 3, 1917, Sec. 10 (29 Stat., 1127; Comp. St., Ann. Supp., 1919, Sec. 3421¼ff) 37

Page

Act of Congress, June 5, 1794, Chapter 50, Sec. 3 (1 Stat. L., 381) 18

Act of Congress, February 18, 1793, Chapter 8, Sec. 27 (1 Stat. L., 305) 18

Act of Congress of March 2, 1799 (1 Stat. L., 678) 19, 21

Act of Congress, June 22, 1874, Sec. 17 (Comp. St., Sec. 10132) 21

Act of Congress, June 15, 1917 (Comp. St., Ann. Supp., 1919, Sec. 7678) 21

Act of Congress, June 30, 1864, Chapter 174, Sec. 33 (13 Stat., 315), (R. S., 4613) 16, 29

Act of Congress, July 18, 1866 (14 Stat. L., 180) 31

Barnes, Federal Code, 1919, Section 1412 7

Section 7635 16

Compiled Statutes, Sec. 1674 11

Executive Order, May 18, 1926 ..... 22, 49

January 17, 1873 22

June 26, 1907 23

August 4, 1909 23

July 9, 1914 23

October 6, 1915 23

April 14, 1917 23

Lewis' Sutherland Stat. Const. (2d Ed.), Vol. II, pp. 965 6, 970 ..... 25, 26

National Prohibition Act, Sec. 26, Title II (Chapter 85, 41 Stat., 305, 315) 5, 12, 13, 28, 32, 35, 41

Sec. 28, Title II 12

Revised Statutes, Section 1014 ..... 7, 8, 11, 39

Revised Statutes, Section 970 12

Revised Statutes, Section 3450 28

Rule 35, Section 5 B, Rules Supreme Court, U. S. 4

Vattel's 20th Rule of Construction 26

Waples on Seizure, Section 43 40

24 R. C. L., 717 41

17 Op. Atys. Gen., 489 38

18 Op. Atys. Gen., 16 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 341.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, LIBELLANT.

BRIEF FOR THE PETITIONERS.

Statement of Fact.

The facts in this case are undisputed. On April 18, 1924, members of the police force of the city of Providence, R. I., discovered Joshua T. Dodge and others aboard the motorboat "*Ray of Block Island*" at a dock in said Providence. The police officers then and there seized said boat and a quantity of intoxicating liquor which was on board.

On the same night said police officers removed the liquor from said vessel and took it to the police station, about a mile away in said Providence; Joshua T. Dodge was also taken into custody by the police officers and charged with illegal transportation of intoxicating liquor.

Several hours after the seizure the motorboat was delivered into the custody of Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island, said vessel having been guarded during the night by city police officers. At the time the vessel was turned over to the director of prohibition there was no liquor aboard and none of the defendants arrested were at the scene, the defendants and the liquor at that time being at the police station.

On December 10, 1924, said Joshua T. Dodge was convicted of illegally transporting intoxicating liquor in violation of Title II, Section 3, of the National Prohibition Act and paid a fine of $500.

On March 5, 1925, the United States Attorney for the District of Rhode Island filed a libel against the motorboat "*Ray of Block Island*," claiming its forfeiture to the United States under the provisions of Section 26, Title II, of the National Prohibition Act (R., 3-4). On April 6, 1925, a lien claim of mortgagee was filed (R., 7), which has not as yet been heard, and on April 7, 1925, William Earl Dodge and Joshua T. Dodge filed their claim for said vessel (R., 7), protesting that the taking over of said motorboat by the Federal prohibition agents from the police officers, by whom the boat was seized, was in violation of law, and

on the same day filed a motion to dismiss the libel on the grounds:

> "1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to Federal officers.
>
> "2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.
>
> "3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession."
>
> (R., 8.)

The answer of the claimants was filed on April 7, 1925 (R., 9), admitting all the averments of fact set forth in the libel, but denying that they constituted a cause of forfeiture.

Thereafter, to wit, on July 24, 1925, the case was called for hearing on the claimants' motion to dismiss and was fully heard and argued by counsel for the respective parties and was held for advisement, and on July 31, 1925, the opinion of the District Court granting claimants' motion to dismiss libel was announced (R., 10).

On August 1, 1925, decree of the District Court was entered dismissing the libel and ordering the United States marshal to deliver said motorboat "*Ray of Block Island*" to said claimants (R., 16). The time for issuance of the warrant of delivery was extended to August 20, 1925 (R., 16); on that date the United States

filed its petition for appeal (R., 17), and on the same date the Government's assignment of errors was filed (R., 18).

On March 3, 1926, the opinion (R., 23) of the Circuit Court of Appeals for the First Circuit reversing the decree of the District Court for Rhode Island was filed (R., 26). On March 29, 1926, on motion of the claimants, the Circuit Court of Appeals stayed its mandate (R., 27), and on April 16, 1926, said claimants filed a petition in this Court praying for a writ of certiorari, to be directed to the Circuit Court of Appeals, to bring up the record.

The United States did not oppose the granting of the writ in their memorandum brief, filed with this Court on the petition for writ of certiorari, and on May 10, 1926, this Court ordered that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit be granted in accordance with Rule 35, Section 5B, of this Court.

Specification of Errors.

The Circuit Court of Appeals for the First Circuit erred in reversing the decree of the District Court in remanding the case to that court for further proceedings not inconsistent with the opinion passed down by the Circuit Court (R., 26).

Question Presented.

The sole question at issue in this case is whether or not a vessel or vehicle used in illegally transporting

intoxicating liquor and seized by officers of the law who are not Federal officers may be forfeited to the United States under the provisions of Section 26, Title II, of the National Prohibition Act.

Statute Involved.

Section 26, Title II, of the National Prohibition Act (chapter 85, 41 Stat., 305, 315) provides in part:

> "When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the

> liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, * * *."

ARGUMENT.

Point I.

Conflicting Law.

This question is brought before the Supreme Court because of three different and conflicting opinions from three circuits, the Fifth, Ninth, and First.

In November, 1923, the Circuit Court of Appeals for the Fifth Circuit decided the case of *U. S. vs. Story*, 294 F., 517. The District Court dismissed the libel, but this order was reversed by the Circuit Court, which held that the Eighteenth Amendment vested concurrent power of enforcement in the States, and that Section 1014 of the Revised Statutes of the United States,

> "providing for arrest of offenders against the laws of the United States by State magistrates, agreeably to the usual mode of process against offenders in such States,"

made it clear that Congress contemplated the enforcement of the amendment through State officers as well as through Federal officers. The court then said that because Section 26 contained the words, "any officer of the law," that a seizure by police officers constituted a good seizure, and that Congress did not provide for

enforcement under Section 26 by Government officers and Federal courts alone.

Section 1014 of the Revised Statutes reads:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."
>
> *Rev. Stat., Sec.* 1014, *Barnes Fed. Code*, 1919, *Sec.* 1412.

This statute clearly intended a mode of procedure by justices empowered to bail after proper arrest in accordance with the law. It does not seem that this particular section of the Revised Statutes in any way authorized police officers to arrest on behalf of the United States except in such cases where Congress has particularly authorized the arrest by police officers of the State; and if the construction of the Story case is sound the appellant says that the seizure was not "agreeably to the usual mode of process against offenders in such State," because it is conceded that there is no State statute in Rhode Island authorizing seizure of vehicles transporting liquor.

Opinion District Court, Record, p. 13.

The Story case holds that the regularity of the seizure is not a necessary condition to a condemnation of the thing seized provided there is sufficient ground for an adjudication of a forfeiture. The case further holds that Section 26 of the act is cumulative and not exclusive.

On page 520 of the opinion the court says:

> "Destruction of the liquor and forfeiture of the vehicle are two rights of different nature and purpose, and the fact that they are both permitted to be pursued in the criminal cause, upon conviction of the person arrested, does not require that this be done."

The court further says, on page 519:

> "The remedy created in Section 26 applies by its terms only when a person is discovered in the act of transporting liquor in violation of the law, and is then and there arrested by the officer, and his vehicle and liquor seized, and he convicted, after being taken by the officer before a court of competent jurisdiction. If this is the only remedy available to the Government, in instances where the person in charge of the offending vehicle escapes before arrest or absconds or dies after arrest, no condemnation of the vehicle would be possible, and a large number of cases would go unprovided for."

In the case of *U. S. vs. Loomis*, 297 F., 359, 362, referring to Section 1014 of the Revised Statutes, the Ninth Circuit said that the section—

> "pertains to the mode or process relative to procedure by which an offender may be arrested, imprisoned, or bailed, but in our opinion does not affect a procedure in the Federal court which has to do with an inquiry into the legality of the seizure and forfeiture of his property."
>
> Citing *Roth vs. U. S.* (C. C. A.), 294 F., 475.

In the opinion of the District Court in the instant case the opinion sets forth (R., 15) that the court is unable to see where Revised Statute, Section 1014, affords support to a broad construction of the words "any officer of the law," contained in Section 26 of the National Prohibition Act, which includes police officers of the city.

In the Story case, *supra*, there was a seizure by police officers of an automobile which was not in the act of offending when the marshal took it over from the State officers. The facts were very similar to the case at bar. The vehicle was forfeitable under the State law.

In the Loomis case, *supra*, the court held that police officers are not authorized to seize vehicles used in transportation of intoxicating liquors, and that statutes authorizing seizure of personal property must be strictly construed. The vehicle was not forfeitable under the State law.

This Circuit Court held that Revised Statutes 1014 had no application to the seizure of property and expressly disapproved of the Story case, holding that the necessity of adherence to the rule of strict con-

struction constrained the court to hold that police authorities were not empowered to make the seizure. In the Loomis case police officers arrested Loomis while in the act of transporting liquor in an automobile in the city of Seattle, and several weeks after the seizure the vehicle was turned over to Federal prohibition authorities who asked for an order of forfeiture.

The court in the Loomis case held that forfeiture could only be declared if the thing sought to be forfeited was lawfully taken into possession. The court says:

> "Nor are we satisfied with the reasoning that, because the thing seized was afterward turned over by the police to the federal authorities, the illegal seizure was adopted, and by adoption related back and became a legal foundation upon which could rest an order of forfeiture and sale."

In the Story case the court relied upon the ruling laid down by this Court in "*The Caledonian*," 4 Wheat., 100; 4 L. Ed., 523, to the effect that—

> "any person may seize any property *forfeited to the use of the Government* either by the municipal law or by the law of prize for the purpose of enforcing the forfeiture," etc.

In the Loomis case the Ninth Circuit does not agree with the reasoning, and on page 362 says:

> "But the seizure there made was by a customs official, and under the general law of prize, and at a time when the general laws of war obtained. In Gelston *vs.* Hoyt, 3 Wheat., 246;

4 L. Ed., 381, Justice Story stated the common-law rule to be that any person might at his peril seize for forfeiture to the government, and that, if the government adopted the seizure and the property was condemned, he would be completely justified, and that it is not necessary to sustain the seizure or justify the condemnation that the party seizing shall be entitled to any part of the forfeiture. The court did not find it necessary, however, to rest its decision solely upon the principle just stated, inasmuch as there were express statutory provisions under which it was made the duty of the officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue.

"Section 1014 of the Revised Statutes (Comp. St. Section 1674), which is made applicable in the enforcement of the National Prohibition Act, pertains to the mode or process relative to procedure by which an offender may be arrested, imprisoned, or bailed, but in our opinion does not affect a procedure in the federal court which has to do with an inquiry into the legality of the seizure and forfeiture of his property."

The District Court in its opinion (R., 13) says:

> "It is conceded that the state law of Rhode Island conferred no authority to seize any boat or vehicle found transporting intoxicating liquor."

The opinion then discussed the case of *Carroll et al. vs. U. S.*, 267 U. S., 132, and especially at page 155, as follows:

"Under Section 28, Title II, of the Prohibition Act the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

" 'When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.'

"It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by showing that he had reasonable or probable cause for the seizure. *Stacey vs. Emery*, 97 U. S. 642.

"It is perhaps significant that the protection afforded by Sec. 28 of the Prohibition Act is

> confined to the 'commissioner, his assistants, agents and inspectors, and all other officers of the United States, whose duty is to enforce criminal laws.' "

The Circuit Court of Appeals agrees with the decision of the District Court as to the construction of Section 26 of Title II of the National Prihibition Act that said section confers authority only upon U. S. officers (R., 24-25), but the Circuit Court is of the opinion that the District Court erred in dismissing the libel, as the United States, in taking over the vessel and filing the libel to enforce the forfeiture, ratified and adopted the acts of the police officers and thereby rendered the seizure lawful under Section 26 (R., 25).

The Circuit Court then, basing as its authority, cites the case of "*The Caledonian*," 4 Wheat., 99, 101, saying:

> "It is a general rule that any person may seize any property *forfeited to the Government*," etc.

The Circuit Court then cites:

Wood vs. U. S., 16 Peters, 341.
Taylor vs. U. S., 3 How., 197.
U. S. vs. Story, 294 F., 547.
U. S. vs. One Studebaker Seven Passenger Sedan, 4 F. (2d), 534.
The "G 883," 6 F. (2d), 416.

In the case of "*The Caledonian*" it will be noted that the decision rested upon the principle of law that

any person may seize any property forfeited. The appellant in the present case contends that his property was not forfeited in the sense with the term as used in "*The Caledonian*" at the time of seizure, and could not be forfeited under Section 26 of the act until after a conviction of the defendant.

The theory laid down in "*The Caledonian*," *i. e.*, adoption, has no application to the case at bar because:

1. The property was not forfeited *ipso facto* to the use of the Government.
2. The property was not forfeited under the law of prize.
3. In the case of "*The Caledonian*" there was a lawful seizure to be adopted, whereas in the case at bar there was not a suitable seizure for the principle of adoption.

It is admitted that the State police could not under the State law or any law other than the Volstead Act seize any vehicle transporting liquor.

In the case of "*The Caledonian*" the vessel sailed as an American ship from Charleston, S. C., with a cargo bound for Lisbon under a British license. During the voyage the ship was captured by a British vessel and sent to Bermuda for adjudication. Upon trial she was acquitted and her cargo, being prohibited from exportation, was sold by the agent of the claimant at Bermuda and the proceeds remitted for his use.

In November, 1913, the vessel sailed from Bermuda and upon her arrival at Newport, in the District of Rhode Island, from which this case arises, she was seized by the collector of the port as forfeited to the

United States. The libel alleged for causes of forfeiture:

> 1. The ship having on board a British license.
> 2. Engaged in trade with the enemy.
> 3 4. For using a British license contrary to the Act of Congress prohibiting the use of British licenses.

On page 102 of the opinion it is said:

> "By the general law of war, every American ship sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. * * * The right of the government to the forfeiture is not founded on the capture; it arises from its general authority to seize all enemies' property coming into our ports during war; * * * it is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law or by the law of prize, for the purpose of enforcing the forfeiture."

It will be noted from the above decision that the court's opinion was based solely upon the law of prize and during a period of war. The court declared the goods and ship forfeited *ipso facto*. The seizure was valid for under the law of prize (or war) anyone is authorized to seize property already forfeited on behalf of the Government. It necessarily follows that in such a case subsequent ratification or adoption, so called, of the original lawful seizure was valid and a forfeiture was perfected.

Quite in contrast to the principle laid down in "*The Caledonian*" is that of the "*Ray of Block Island.*" In this case neither the goods or the vessel were forfeited *ipso facto*. As will be later shown in the brief any property which may have a lawful use is not forfeited *ipso facto*, and under Section 26, Title II, of the National Prohibition Act, even though the vessel may have been used for an unlawful purpose, the vessel would not be forfeited except upon a culmination of certain criminal provisions of the act.

On June 30, 1864, Congress passed an act (*R. S., Sec.* 4613; *Act June* 30, 1864, *c.* 174, *Sec.* 33, 13 *Stat.* 315; *Barnes Federal Code*, 1919, *Sec.* 7635) known as the law of prize which provided:

> "The provisions of this Title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States."

On the same date and in Section 29 of the same statute there was a provision relative to recaptures.

An examination of these statutes used as the basis of prize clearly shows that the case of "*The Caledonian*" was founded upon acts of Congress which were devised to safeguard the nation in so far as neutrality was concerned. These acts were passed in view of international standards and drastic legislation was set forth therein. This Court had no difficulty in determining the intent of Congress from the wording of those acts.

Throughout the reports there is nowhere found an-

thority for the theory of adoption unless it can be based upon R. S. 4613, which says that the provisions shall apply to captures made as prize or adopted and ratified by the President of the United States.

The theory of adoption will be discussed later in the brief, but the appellant contends that there is nothing in the case of "*The Caledonian*," nor in the cases cited by the Circuit Court in the "*Bay of Block Island*," which warrant the application of the theory of adoption on the part of the Government.

In the case of *Gelston et al. vs. Hoyt*, 3 Wheat., 246, there was a civil suit brought in New York for an alleged trespass for taking and carrying away and converting to their own use the ship "*American Eagle*." The defense was that the ship was attempted to be fitted out and armed for employment in the service of a foreign state to commit hostilities upon the subjects of another foreign state with which the United States was at peace, and that the ship was seized in pursuance of instructions and directions of the President of the United States as *forfeited* to the use of the United States according to the statute aforesaid.

The second plea set forth that the ship was seized "under instructions of the President of the United States in order to the execution of the prohibition and penalties of the act in such cases made and provided."

The act referred to is the Act of June, 1794, providing that if any person should fit out and arm or attempt to fit out and arm or in any way be concerned in fitting out and arming a ship with intent to have the same

employed in the service of any foreign state with whom the United States is at peace, every such vessel should be forfeited, one half to the person giving the information and the other half to the United States.

The seizure was made by the Collector of Customs of New York in accordance with the Act of the 18th of February, 1793, chapter 8, Section 27 (Stat. at Large, vol. I, p. 305), providing that officers of the revenue were authorized to make seizures of any ship or goods for a breach of the neutrality laws of the United States.

The statute of June 5, 1794, chapter 50, Section 3 (Stat. at Large, vol. I, p. 381), prohibited the fitting out of any vessel to cruise against the subjects of any foreign state at peace with the United States. The suit sounded in tort and resulted in a judgment of $106,000 for the plaintiff claiming an illegal seizure, and the verdict was upheld by the United States Supreme Court. The United States District Court held that there was no reasonable cause for seizure and refused to issue a certificate of probable cause.

The entire case, as in the case of "*The Caledonian*," was based upon a statute passed by Congress pertaining to the neutrality laws of the nation. The statute authorized seizure because of the fact that once a vessel was armed in violation of the statute it became forfeited *ipso facto* to the United States.

The much-quoted statement of Judge Story in his opinion, found on page 310, to the effect that at common law "any person may, at his peril, seize for a forfeiture to the Government; and if the Government adopt his seizure he will be justified," is pure *dicta*

in so far as the opinion of the court is concerned. A careful reading of the case shows that this statement was made by the justice who wrote the opinion and who had in mind the neutrality law and the wording thereof as heretofore quoted.

The case of *Taylor et al. vs. U. S.*, 3 How., 197, was based upon the revenue laws and the Duty Collection Act of March 2, 1799, chapter 128. Section 68 of the act authorized certain officers of the United States, or other persons specially appointed by either of them for that purpose, to capture vessels, search for and seize goods taken in violation of the customs laws. The decision was based upon the internal-revenue laws which, we will point out, are entirely different and which have received much more liberal construction than penal statutes such as the Volstead Act, and especially Section 26 thereof.

In construing the Act of March 2, 1799, in the case of "*The Missouri*," 17 Fed. Cases, 479, Case No. 9652, the court said, in citing *Taylor vs. U. S.*, 3 How., 210:

> "In construing such a statute, milder as it is than many statutes, it should be borne in mind, that it is a revenue law, and like all revenue laws, to be so construed as effectually to accomplish the intention of the legislature, and not, necessarily, with great strictness in favor of the defendant."

The Duty Collection Act, March 2, 1799, is:

> "An act to regulate the collection of duties on imports and tonnage."
>
> *Vol. I, U. S. Statutes at Large, p.* 627.

In the case of *Wood vs. U. S.*, 16 Peters, 342, decided by this Court in 1842, the court says that a seizure can be sustained if, in point of fact, the seizure could be maintained as founded upon an actual forfeiture *at the time* of the seizure.

Once more the appellant would call to the attention of the Court that there is distinction between forfeiture at the time of the seizure as set forth in the Wood case, and forfeiture dependent upon subsequent events in pursuance of Section 26 of the Volstead Act.

Ever since the decision in the Boyd case the generally accepted view has been that the Government can claim no advantage as a result of an illegal search and seizure, and that the person whose rights have been violated must be placed in *statu quo*.

Boyd vs. U. S., 116 U. S., 616.

Point II.

Construction of Statutes.

The Story case holds that Section 26 of the Volstead Act is broad enough to confer authority upon State as well as Federal officers. It also holds that there is no need to show that the vehicle proceeded against be still violating the law, after seizure by State officers, and when surrendered by them to the United States Government. This case also holds that the regularity of the seizure is not a necessary condition to condemnation, providing there is sufficient ground for forfeiture.

The same section is again construed in a District

Court decision in the State of Washington, in which it is said:

> "The forfeiture demanded is a proceeding in rem under the procedure provided by the National Prohibition Act, and such procedure must be complied with in order to divest the owner of his title. The procedure provided is not merely directory and cumulative, but is jurisdictional. This statute gives a new power, a power to divest title from the owner of property, and the statute provides means of enforcing such power, which is controlling. * * * Under the Act of March 2, 1799, 1 Stat. 678, the right to libel was absolute, and not dependent upon statutory conditions and restrictions; and the return of a car used in violation of Act, June 22, 1874, Sec. 17 (Comp. St. Sec. 10132), could not be decreed prior to a declaration of forfeiture. The Act of June 15, 1917 (Comp. St. Ann. Supp. 1919, Sec. 7678f), gives the owner the right to petition a restoration any time before condemnation proceedings have been instituted. Under the acts, *supra*, the disposition of the property is decreed upon trial after seizure on process duly issued.
>
> "By the provisions of Section 26, *supra*, the vehicle after seizure may be instantly returned to the owner, upon execution by him of a bond to produce the property at the criminal trial, and disposition must be decreed upon the trial of the criminal case. Forfeiture by original seizure depends upon the statute. Congress may declare the forfeiture absolute upon the seizure, or make the forfeiture depend upon conditions. *U. S. vs. Stowell*, 133 U. S., 11; 10 Sup. Ct., 244; 33 L. Ed., 555. The Congress may provide for the seizure of the vehicle at any time, for having

offended, but before any forfeiture can be decreed, the jurisdictional facts as outlined by the statute must be in harmony with the taking or detention. *U. S. vs. Two Hundred and Sixty-seven Gold Pieces and One McLaughlin Automobile* (D. C.) 255 Fed., 217."

U. S. vs. Hydes, 267 Fed., 470 (D. C.).

A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor.

U. S. vs. Slusser (*D. C.*), 270 Fed., 818.

The Story case, as already set forth, construes Section 26 to mean that seizure by officers other than those of the United States may be adopted by the Government. In the opinion of the Circuit Court in the case at bar, although the court agrees with the Loomis case to the effect that there is no statutory power enabling officers other than Federal officers to make seizures under Section 26, it decides that if a seizure is made by any person it may be adopted by the Government.

By executive order, dated May 18, 1926, published May 21, 1926, and numbered 4439, President Coolidge amended an executive order of January 17, 1873, which was issued by President Grant. That order declared that no person holding a Federal position, with certain exceptions, should hold office under any State or local Government. The order of President Coolidge removed the inhibition against the employment of State officers as Federal agents which existed by virtue of the policy adopted by President Grant.

There were many precedents for this policy.

President Roosevelt's executive order of June 26, 1907.

President Taft's executive order of August 4, 1909.

President Wilson's executive orders of July 9, 1914, *October* 6, 1915, *April* 14, 1917.

The right of the President in the premises was challenged and the matter received the attention of the Senate Judiciary Committee which, by a majority report, stated that no constitutional principle, in its opinion, was violated by the order.

It is apparent, however, that prior to May 8, 1926, State officers were prohibited to act for and in behalf of the United States as Federal officers. In the city of Providence, State of Rhode Island, the police department passed rules and regulations, a copy of which was as follows:

> "The police shall devote their whole time and attention to the business of the department, and they are expressly prohibited from following any other calling, or being employed in other business. Although certain hours are allotted to the respective members for the performance of duty on ordinary occasions, yet at all times, when notified, they must be prepared to act immediately, and the same responsibility as to the detection and prevention of crime and the promotion of order rests upon them when not in uniform, or off duty, as when on duty in uniform."

It is apparent, therefore, that at the time of the seizure of the "*Ray of Block Island*" President Grant's order was in effect as well as the rules of the police department of the city of Providence prohibiting police officers from acting as Federal agents.

It is further apparent that if the police officers in seizing the motorboat "*Ray of Block Island*" seized in behalf of the United States it was as citizens and not as "*any officer of the law*," because of the fact that they were prohibited from acting on behalf of the United States by President Grant's order as Federal officers, and were prohibited from holding office in behalf of the Government by orders of the police department of the city of Providence.

The legislature of Rhode Island has passed no law authorizing any officer of the State of Rhode Island to seize any vehicle transporting liquor either in behalf of the United States or in behalf of the State of Rhode Island. In fact the Eighteenth Amendment has yet to be ratified by the legislature of the State of Rhode Island, although the State has a prohibition law.

A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy, of the law. "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."

Todd vs. U. S., 158 U. S., 278; 15 S. C. R., 889; 29 L. Ed., 982.

Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language.

U. S. vs. Sheldon, 2 Wheat., 119; 4 L. Ed., 199.

Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.

Lewis' Sutherland Stat. Const., 2d Ed., vol. II, p. 965, and cases cited.

Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law. All doubts as to construction are resolved in favor of the defendant. It is a principle in the construction of statutes that the legislature does not intend to grant exceptional powers, privileges or exemptions by doubtful language, but will in such cases express itself clearly, and intends no more than it so expresses.

Lewis' Southerland Stat. Const., supra, p. 966, citing U. S. vs. Paul, 6 Peters, 141; 8 L. Ed., 348.

Effect is to be given to the plain meaning of the language, and strict construction is to be applied only where the effect is reasonably open to question.

Bolles vs. Outing Co., 175 U. S., 262; 20 S. C. R., 94; 44 L. Ed., 156.

When either of two constructions can be given to a statute and one of them involves a forfeiture, the other is to be preferred.

Lewis' Southerland Stat. Const., supra, citing Vattel's 20th Rule of Construction.

Farmers', etc., Nat. Bank vs. Dearing, 91 U. S., 29, 35; 23 L. Ed., 196.

Nor can a statute be extended beyond its grammatical sense or natural meaning on any plea of the failure of justice. If the statute is ambiguous, the construction adopted should be that most favorable to the accused. Courts are authorized to inquire into and carry out the manifest intention of the legislature; but if there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.

Lewis' So. Stat. Const., supra, p. 970.

In connection with the above citations it will be noted that in the opinion of the Circuit Court in the case at bar the court expressly held that Federal officers *only* were included under the National Prohibition Act, and that only Federal officers were empowered to seize under the act, yet adhered to the doctrine of adoption.

This Court has also held that statutes to prevent frauds upon the revenue, although they imposed penalties or forfeitures, are not to be construed like penal laws generally strictly in favor of the defendant, but are to be fairly and reasonably construed so as to carry out the intention of the legislautre.

U. S. vs. Stowell, 133 U. S., 1.

Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.

Cliquot's Champagne, 3 Wall., 114, 145.
Skinner vs. Thomas, 171 N. C., 98.
U. S. vs. One Cadillac, 255 Fed., 173.

In Skinner *vs.* Thomas, *supra*, the facts involve the protection of the mortgagee's interest in vehicles seized while transporting intoxicating liquor. Regarding forfeiture, the court, in citing *Smithwick vs. Williams*, 30 N. C., 268, says:

> "Penal statutes cannot be extended by equitable construction beyond the plain import of their language."

And in another case it was held:

> "It is a well settled rule that penal statutes must be strictly construed. They will receive no equitable construction beyond their plain language."
>
> *McLaughan vs. Mitchell*, 126 N. C., 683.

Under the settled principles of the common law, and the constitutional provisions for the security of person and property, and immunity from unreasonable searches and seizures, a seizure cannot be made except

under authority of a statute conferring power so to do.

Re Swan, 150 U. S., 637; 37 L. Ed., 1207; 14 S. C. R., 225.

The provisions of the internal-revenue laws do not apply to cases arising under the National Prohibition Act and libels filed under this act must stand or fall under the authority of the National Prohibition Act alone.

U. S. vs. Amer. Brewing Co., 296 F., 772.

The Ninth Circuit Court, which decided the Loomis case, 297 F., 359, in a later decision reaffirms the Loomis case and draws a large distinction between forfeiture cases under Section 26 of Title II of the National Prohibition Act and forfeiture under Section 3450 of the Revised Statutes, for defrauding the Government of an internal-revenue tax.

The court, in this later case, holds that it decided in the Loomis case that police officers were not officers within the meaning of Section 26. The court then says that the discussion in the opinion extended to forfeitures generally, but that part of the discussion was mere *dicta;* that the court is convinced that seizure by a revenue officer is not a necessary perquisite of a forfeiture under Section 3450 of the Revised Statutes.

This circuit then draws the distinction, already set forth in this brief, to the effect that the cases of *Gelston et al. vs. Hoyt, supra, Wood vs. U. S., supra,* and *Taylor et al. vs. U. S., supra,* were cases involving either the law of prize or the revenue statutes.

By implication, the Ninth Circuit therein holds that seizures under the internal-revenue or prize law may be sustained where the seizure is made by any person, and that the theory of adoption may follow, but that under Section 26 of Title II of the National Prohibition Act the seizure must be made by Federal officers of the United States and none other.

U. S. vs. One Studebaker 7 Passenger Sedan, 4 F. (2d), 534 (C. C. A.).

U. S. vs. One Cadillac, 255 Fed., 173.

> "A right to seize under a federal act must be found in the federal statutes. As a general rule of construction, statutes which confer upon officers powers of seizure and arrest refer only to officers of the jurisdiction which enacts the statute. * * * The seizures by the police appear to have been unwarranted in law."
>
> *U. S. vs. One Reo Motor Truck*, 6 F. (2d), 412 (D. C.).

Point III.

Prize Law.

The law of prize (R. S., Sec. 4613, Act of June 30, 1864, c. 174, Sec. 33, 13 Stat., 315) has already been quoted in this brief under point one. As has already been pointed out, this is a statute which provides for adoption of seizures and ratification by the President of the United States.

It has been held that captures in war enure to the Government and can only become private property by

its grant. The right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress.

An examination of the statutes pertaining to prize discloses that the Government intended to declare no property rights existing in any vessel used in violation of the neutrality laws, and that if captured the prize master and his crew were to divide the spoils (R. S., 4613).

However, by Act of Congress, March 3, 1899, chap. 413, Sec. 13, 30 Stat. 1007, the law distributing proceeds of prize among captors was repealed.

See "The Manila Prize Cases," 188 U. S., 254.

It is sufficiently obvious that the general object of the enactment of the prize law was to promote the suppression of rebellion by subjecting property employed in aid of it with the owner's consent, to confiscation. It extended to all descriptions of property, real or personal, on land or water. All alike were made subjects of prize and capture, and, under the direction of the President, of seizure, confiscation, and condemnation.

The law of prize is a law of war, which is to be exercised at the order of the Executive, and not upon the principles of policy or equity; and while prize courts, where questions of doubt arise, yield as far as possible to the claims of humanity and respect for personal rights, yet they cannot be controlled by such considerations. By the prize law, as accepted at the present time, war vessels of a belligerent had the right, in the absence of any declaration of exemption by the political

power, to capture wherever and whenever found afloat anything which belongs to or is the property of the enemy.

"*The Buena Ventura,*" 87 Fed., 927, 929.

In the case of "*The Caledonian,*" 4 Wheat., 99, 101, it would seem that the general rule therein laid down is not one to be applied to all seizures, but to only those seizures of property which is already forfeited to the use of the Government.

Property is captured when it is taken or seized when in hostile possession by the military or naval forces, and is property which has been actually seized by such forces.

Lamar, executor, vs. Browne et al., 92 U. S., 187-194.

U. S. vs. Padelford, 76 U. S. (9 Wall.), 531-540.

In the case of *Lamar, executor, vs. Browne et al.*, 92 U. S., 187, there was an action of trover to recover for alleged conversion of certain cotton by the defendants. The defendants justified as agents of the United States to receive and collect abandoned and captured property, under several acts of Congress. The cotton had been seized by the Government during the Civil War. The court said:

> "Property captured at sea can never be converted by the captor until it has been brought to legal adjudication; and it is his duty to bring his prize into some convenient port for that purpose. Not so in general with regard to movable

> property on land. There the capture changes the ownership without adjudication unless restrained by governmental regulations."

This point is raised chiefly for the purpose of emphasizing the fact that cases relied upon as authority in the Story decision are cases founded upon seizures arising out of violations of the revenue laws or the law of prize.

Point IV.

Transportation.

It has been held that a vehicle which has reached the end of its journey, but is not unloaded, that is, its load still remains to be delivered, may still be considered as being used for the transportation of its contraband cargo. The common reasoning would be that after transportation is ended the vehicle cannot be seized because it had been used in the unlawful transportation of intoxicating liquors, and this especially in view of Section 26, which says:

> "When the commissioner, his assistant, inspectors, or any officer of the law, shall discover any person in the act of transporting in violation of law," etc.
>
> *Sec. 26, Title II, N. P. A. (Chap. 85) 41 Stat., 305, 315.*
>
> *State vs. Charosky*, 122 Me., 285.

It has been held in the Federal courts that the arrest of a defendant for a previous illegal transportation of liquor under Section 26, N. P. A., does not authorize

the seizure without warrant and forfeiture of an automobile used in such prior transportation.

U. S. vs. Hydes, 267 F., 470 (D. C.).

And, again, it has been held that forfeiture of vehicles must be in strict pursuance to the terms of the statute in the following essentials: (1) That an officer of the law discover some person in the act of illegally transporting liquor in the vehicle; (2) the seizure of the liquor so transported or possessed; (3) the seizure of the vehicle and arrest of the person; (4) that the *officer* proceed against the person and retain the vehicle, unless redelivered to the owner on giving bond; (5) conviction of the person and order of sale of the vehicle; (6) distribution of the proceeds.

U. S. vs. Slusser, 270 Fed., 818 (D. C.).

It will be noted from the law as laid down in the above case that there must be a sale of the vehicle seized and distribution of the proceeds, both of which are absolutely opposed to the law of prize on which the cases of "*The Caledonian*," *Gelston et al. vs. Hoyt*, and *U. S. vs. Story* were based.

Point V.

Officers.

In the case of *U. S. vs. Loomis*, 297 Fed., 359, the court, on page 361, says:

> "We are cited to section 15 (35 Stat. 622, Comp. St. Sec. 2953), conferring power upon 'any civil officer having authority under the

laws of the United States or of any state, territory, or district to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps * * * and deliver him into the custody of the naval authorities'; but it is to be noted that the express language of that statute makes it lawful for any such civil officer to arrest. There is an express authority also under Rev. St. Sec. 3071 (Act July 18, 1866, 14 Stat. 180, Comp. St. Sec. 5774), for marshals, their deputies, sheriffs or their deputies, constables and police officers to apprehend, arrest, and receive the surrender of deserters. So, in the Act of July 5, 1884 (23 Stat. 118, Comp. St. Sec. 4299), pertaining to the admission of Chinese laborers, "* * * all peace officers of the several states and territories * * * are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act," etc.; and in the later Act of September 13, 1888 (25 Stat. 479 Comp. St. Sec. 4313), 'all peace officers of the several states and territories * * * are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States,' etc. Cases which decide upon the admissibility of evidence are not persuasive, for the regularity of a seizure is not always a necessary condition to the use of the thing seized as evidence upon a criminal trial, where conviction of an offense is sought. The courts will not try the collateral question of how the evidence was obtained. Robinson *vs.* U. S. (C. C. A.), 292 Fed. 683."

And the above circuit subsequently sustained this ruling to the effect that police officers had no right to seize under Section 26, Title II, of the National Prohibition Act.

U. S. vs. Thomas, 297 Fed., 362.

Police officers are not such officers of the law as may seize under Section 26.

U. S. vs. One Reo Motor Truck, 6 Fed. (2d), 412.

And in the Fourth Circuit the court has said:

> "Doubtless it (Eighteenth Amendment) does confer upon the several states power to enact legislation appropriate to the purpose of enforcement of the amendment. * * * But it does not make prohibition officers of the several states, by reason of their state commissions, officers of the United States exercising federal authority."
>
> *Kanellos vs. U. S.*, 282 Fed., 461.

The Circuit Court of Appeals in the case at bar cites as authority for its decision "*The Caledonian*," 4 Wheat., 99, 101, and, among others, the "*G-883*," 6 Fed. (2d), 416. The latter citation, we respectfully submit, is not in point because the vessel was arrested by officers of the United States as she was coming in from sea. The vessel was not taken by police officers and the vessel at the time was not arrested under Section 26 of the Volstead Act, but for violating the internal-revenue laws. The case is not in point.

The same may be said of the citation *U. S. vs. One Studebaker 7 Passenger Sedan*, 4 Fed. (2d), 534, de-

cided in the Ninth Circuit, because that was a seizure under the internal-revenue laws and not under Section 26, Title II, of the National Prohibition Act.

The United States has no power to take liquors away from a State officer who seizes them under a State statute.

> *U. S. vs.* 26 *Cases of Intoxicating Liquor*, 287 Fed., 540 (D. C.).

The law cannot blow hot and cold together. If police officers are authorized to seize under Section 26 on the theory that they are officers of the law, then their actions should be controlled by the Fourth and Fifth amendments of the Constitution of the United States. It would be inconsistent to hold that they are Federal officers acting in pursuance of a Federal statute at the time of the seizure of a vehicle for the purpose of forfeiture, and that they are not Federal officers when, on trial, the Fourth and Fifth amendments are invoked as a protection to the defendant against unlawful acts of State officers.

It has been held in the District Court for the Western District of Missouri that the Fourth Amendment to the Constitution of the United States is not directed to individual conduct of State officials. Police officers of that State may make arrests for violation of the prohibitory law by virtue of the authority vested in them in the *enforcement act of that State*, which is concurrent with the Federal enactment known as the Volstead Act. The court says:

> "In so doing they act as state officers, and, though their procedure may not accord with that required and guaranteed by the fundamental law in the federal jurisdiction, nevertheless the evidence they procure, if otherwise competent and material, may be used in prosecutions in a federal jurisdiction, if it comes to the knowledge of the federal prosecuting officer. But, as has been said by the Supreme Court, and in the lesser federal courts, the alleged unlawful search and seizure must not be made by, or under the direction of, any officer of the United States."

This Court seems to clearly draw a distinction between State and Federal officers, and that when an officer of the State acts he is not acting in pursuance of any Federal statute. The court holds that if there is a tacit understanding between State and Federal officers regarding the enforcement of the Federal Prohibition Law that the presence of State officers cannot affect the defense afforded by the Fourth and Fifth amendments to the Constitution.

U. S. vs. Falloco, 277 Fed., 75.

Marron vs. U. S., 8 Fed. (2d), 251, 259 (18-19) (C. C. A.).

The Circuit Court for the First Circuit has already decided that police officers are not officers of the United States.

> "Under the Act of March 3, 1917, Sec. 10 (29 Stat. 1127, Comp. St. Ann. Supp. 1919, Sec. 3421¼ff), it is provided that, in the District of Columbia, prohibition search warrants 'shall be

placed in the hands of the captain, or acting captain, of the police precinct in which the room, house, building, or other place referred to is located.' Police captains are officers of the District of Columbia and not of the United States. 17 Op. Attys. Gen. 489; 18 Op. Attys. Gen. 16)."

Keene vs. U. S., 300 Fed., 493, 501.

It has been held that under 13 U. S. Stat. at Large, 29, authorizing the condemnation of any boat introducing intoxicating liquor into the Indian country on a seizure made by the "Superintendent of Indian Affairs, an Indian agent or sub-agent, or the commanding officer of a military post," there is no jurisdiction unless the libel shows a seizure by one of those officers; and an amended libel is fatally defective which shows only a seizure by the marshal under a writ based on the original libel.

U. S. vs. "The Cora," 46 N. W., 503 (Dak. Sup. Ct.).

POINT VI.

Search and Seizure.

Search and seizure under the National Prohibition Act, and especially Section 26 of Title II, where forfeiture is demanded, is a proceeding *in rem*, and such procedure must be complied with in order to divest the owner of his title. This statute gives a new power, a power to divest title from the owner of property, and the statute provides the means for enforcing such power, which is controlling.

U. S. vs. Hydes, 267 Fed., 470.

It is apparent under the foregoing decision that title is not divested *ipso facto* as under the revenue laws, the basis for "*The Caledonian*" and similar decisions. Seizure of the vehicle can only be made when liquor is seized. The law does not forfeit all vehicles at some time used for illegal transportation of liquor, but only those taken in the act. One may be convicted of illegal transportation, yet the vehicle will not be forfeited, unless seized at the time.

U. S. vs. Slusser, 270 Fed., 818.

There is a vast difference between seizures under Section 26, Title II, of the National Prohibition Act and those under Section 3450 of the Revised Statutes for violation of the internal-revenue laws.

U. S. vs. One Studebaker 7 Passenger Sedan, 4 F. (2d), 534.

Seizures by the police are unwarranted in law.

U. S. vs. One Reo Motor Truck, 6 F. (2d), 413.

Property cannot be seized under a common-law libel *in rem*, since the National Prohibition Act is in derogation of the common-law rights of citizens. Specific procedure provided for its enforcement must therefore be regarded as exclusive.

U. S. vs. Franziono, 286 Fed., 769 (C. C. A. Dis. Col.).

Rev. Stat., Section 1014 (Comp. Stat., Sec. 1674), for an arrest by State officers, "agreeably to the usual mode of process against offenders in such State," ap-

plies only to State procedure for arrest, imprisonment, or bail, and not to procedure in the Federal courts, and the defendant obtains no vested right to a preliminary examination before a commissioner.

Roth vs. U. S., 294 Fed., 475, 478.

A defective seizure cannot be made effective without the repair of the defects. To cure it we must make it sufficient; the remedy must be administered to the seizure itself, so as to make it whole. So long as it remains insufficient, no pleading nor judicial order, nor even admission by the claimant, which do not concede the legality of the seizure, can lead to a lawful condemnation of the thing.

Waples on Seizure, Section 43.

> "Let it never be questioned that proceedings *in rem* are void *ab initio* without seizure sufficient; that there is no reliable authority, and can be none to the effect that insufficient seizure can be cured by anything less than the making of it sufficient."
>
> *Waples on Seizure*, Sec. 43, Note.

The protection (of the Fourth Amendment) against unreasonable searches and seizures does not apply to searches and seizures under statutes providing for the collection of the public revenue, nor does it conflict with the authority of officers or private persons under proper limitations to arrest without a warrant when *authorized by the common law or by a statute.*

Property held contrary to law: It has been held, however, that only such property or articles as are in-

tended to be used in violation of law and can be used for no legitimate purpose can be summarily seized by the police authorities, and that an article which may or may not be used for legal purposes cannot be seized until it has first been properly established in a court of criminal jurisdiction that the article was procured, held, or used for an illegal purpose.

Board of Police Commissioners vs. Wagner, 93 Md., 182; 24 R. C. L., 717.

Point VII.

Adoption.

The appellant has previously cited the law of prize being the only statute using the word "adopt" and intimating that a seizure may be adopted by the Government. We have also quoted that rule of law, which says that in order for there to be an adoption of a seizure there must have been a right of seizure either by common law or statute.

In Rhode Island there was no common-law right of seizure for transportation of intoxicating liquors, and under the Rhode Island statutes there is no authority for a seizure of the vehicle transporting intoxicating liquor.

It naturally follows that there was no authority, either at common law or by the statutes of the State of Rhode Island, authorizing a police officer to seize any vehicle transporting intoxicating liquor. If the seizure can be validated in any sense, it must be on the theory that a police officer is authorized by Section 26 to seize

vehicles transporting intoxicating liquor, and in determining this we should keep in mind the fact that the rules of the police department of the city of Providence do not authorize a police officer to act as a Federal officer nor to hold any office other than that to which he is appointed.

Police of the city of Providence are, therefore, not officers of any law other than the laws of the State of Rhode Island under which they are created.

POINT VIII.

Forfeitures.

The forfeiture of a vehicle used for the unlawful transportation of intoxicating liquor under Section 26, Title II, of the National Prohibition Act *is not absolute*, as was the forfeiture of vehicles used in the removal of liquor on which the revenue tax was not paid, under Rev. Stat., Sec. 3450.

U. S. vs. Sylvestre, 273 Fed., 253.

A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with fair principles of interpretation.

U. S. vs. One Cadillac 8 Automobile, 255 Fed., 173 (D. C.).

Cases decided upon statutes which forfeit vehicles or vessels *ipso facto* adhere to the theory of adoption.

"The Caledonian," 4 Wheat., 99-101.

Taylor vs. U. S., 3 How., 197.

Wood vs. U. S., 16 Peters, 341.

Other cases hold that where a statute takes away a common-law right it is penal in its nature and must be strictly construed. These cases hold that police officers are not authorized to seize under Section 26, Title II, of the National Prohibition Act.

U. S. vs. Loomis, 297 Fed., 359 (C. C. A., 9).
U. S. vs. Thomas, 297 Fed., 362 (C. C. A., 9).
U. S. vs. One Reo, 6 Fed. (2d), 413 (D. C.).
U. S. vs. Hydes, 267 Fed., 470 (D. C.).

The distinction between cases upon which seizure may be adopted and those in which the theory of adoption does not prevail are found in recent decisions.

U. S. vs. One Studebaker, 4 Fed. (2d), 534 (C. C. A., 9).

In the latter case the Circuit Court explains the decision of *U. S. vs. Loomis* and sustains its prior decision.

Point IX.

Miscellaneous.

Articles designed for use in violation of the criminal law and which can be used for no legitimate purpose whatever may be seized by police authorities, providing there is statutory power therefor.

Bd. of Police vs. Wagner, 93 Md., 182.

The seizure in the above case was upheld by the court on the ground that the property seized could be put to no legitimate use under any theory of law.

A seizure is an assertion of title in the Government, and the subsequent proceedings in court are proceedings to try the title so asserted.

The Missouri, Fed. cases 479 and 481.

Pelham vs. Rose, 76 U. S. (9 Wall.), 103, 106.

The appellant desires to call the Court's attention under this point to the fact that at the time the "*Ray of Block Island*" was taken over by the Federal agents there was no liquor on board and there was no transportation of liquor in the sense of the wording of Section 26, Title II, of the National Prohibition Act.

When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed.

Traffic Truck Sales Co. vs. Justices Ct., 192 Cal., 377.

This Court has held that searches and seizures in behalf of the United States are always within the jurisdiction of district courts of the United States. If seizure is made by a Federal officer, he may be compelled to either proceed for forfeiture or to abandon the seizure.

Query: Would the court have the same jurisdiction over a police officer in the case of the motor boat "*Ray of Block Island*"?

Slocum vs. Mayberry et al., 2 Wheat., 1.

We are familiar with that section of the case of *Carroll vs. U. S.*, 45 Sup. Ct. Rep., 280, where the court, at page 285 (267 U. S., 132, 152), says:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for *contraband goods*, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

The court had in mind questions of probable cause on what is deemed an unreasonable search and seizure. In the next paragraph the court says:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor," etc.

and further on:

> "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in:"

and still further, on the same page, this Court said:

> "Section 26, Title II, of the National Prohibition Act, like the second section of the act of

1789, for the searching of vessels, like the provisions of the act of 1815, and section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the act of 1822, and that of 1834 and section 2140, R. S., and the act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and thirdly, the driver was to be arrested."

At page 286 in this case, as reported in 45 S. C. R., the court says:

"Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. * * * * Under Section 28, Title II of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes (Comp. St. Sec. 1611), providing that: 'When, in any prosecution commenced on account of the seizure of any vessel, * * * made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the Court that there was reasonable cause of seizure, the

court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs.' "

These paragraphs were previously quoted by the justice in the District Court for the District of Rhode Island in his opinion (R., 13-14).

The appellant feels constrained to emphasize the words of the district court in the last paragraph on page 14 of the record, which are as follows:

> "While a statute of the United States may provide that action may be taken by state officers in aid of a federal statute, it is doubtful if a federal statute can impose upon a state officer a positive duty of that kind. At least we should be disinclined to construe a statute imposing a duty upon 'any officer of the law' to include other officers than those of the United States. We should at least require unambiguous language to support such a construction."

With these paragraphs in mind, it is well to read the first few lines of section 26 of Title II of the National Prohibition Act, which says:

> "When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, *it shall be his duty* to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *shall take posses-*

force this section, then there is no statutory authority for a seizure by the police of any city or town.

Without such authority, under cases such as "*The Caledonian*" and *Gelston et al. vs. Hoyt*, the theory of adoption collapses. There was no common-law right to seize for illegal transportation, so that the theory of adoption could not be predicated upon such a basis. There is no Rhode Island statute permitting seizure of vehicles for unlawful transportation and adoption by a citizen surely could not follow.

There remains, then, as a basis for a valid seizure section 26 only. If the police are not officers of the law properly authorized to seize under this section, as is set forth in the Loomis case, and the circuit court decision in the case at bar, there remains the discussion of the seizure as a citizen under said section 26. Keeping in mind that it is a penal statute to be strictly construed, there is no authority for a person to make a valid seizure under said section 26, and therefore the theory of adoption must fail.

For the reasons set forth the appellant contends, and especially where the vessel was turned over to the Federal authorities long after the liquor was removed from it, that the decree of the district court was correct, and that the Circuit Court of Appeals for the First Circuit was in error in entering the decree dated March 3, 1926 (R., 26), and the appellant therefore urges upon this Court that said decree of the Circuit Court of Appeals be reversed, and that the case be remanded to the District Court for the District of Rhode Island, with instructions to enter a decree for the de-

livery of said motorboat "*Ray of Block Island*" to the claimants.

Respectfully submitted,

WILLIAM EARL DODGE AND
JOSHUA T. DODGE,
By Their Attorneys DANIEL T. HAGAN,
PETER W. McKIERNAN.

Argued by DANIEL T. HAGAN.

Office Supreme Court, U. S.
FILED
APR 16 1926
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1 1 [redacted] 341

WILLIAM EARL DODGE ET AL., Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE, AND BRIEF IN SUPPORT OF PETITION.

DANIEL T. HAGAN,
PETER W. McKENNAN,
Counsel for Petitioners.

INDEX.

	Page
Notice	1
Petition for writ of certiorari	3
Questions presented	3
Statement of the case	4
Brief in support of petition for writ of certiorari	7
Statement of the case	7
Argument	8
Point I. The decree is in conflict with the weight of authority	9
Point II. Whether said decree decides an important question of Federal law which has not been but should be settled by this court	12
Point III. Whether this court shall grant said writ because said decision is in conflict with the decisions of another Circuit Court of Appeals in the same matter	14
Conclusion	14

Table of Cases Cited.

Gelston v. Hoyt, 3 Wheat., 246; 4 L. Ed., 381	12, 13
Taylor v. United States, 3 Howard, 197; 11 L. Ed., 559	12, 13
The Caledonian, 4 Wheat., 101; 4 L. Ed., 523	11, 12
United States v. Loomis, 297 Fed., 359 (9th C. C. A.)	9, 12, 14
United States v. One Reo Motor Truck, 6 Fed. (2), 412	9
United States v. Story, 294 Fed., 517	10, 14
United States v. Thomas, 297 Fed., 362 (9th C. C. A.)	9, 10
Wood v. United States, 16 Pet., 342; 11 L. Ed., 987	12

Other Authorities Cited.

National Prohibition Act, Section 26, Title II (Comp. St. Ann. Supp. 1923, Section 10138½*mm*)	9, 10
Rule 35, Supreme Court of the United States, Section 5 (*b*)	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
LIBELLANT, RESPONDENT.

NOTICE OF DATE OF FILING.

Please take notice that in the above entitled cause a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review said cause has been filed this — day of April, A. D. 1926, a copy of said petition and of the brief in support thereof are hereto attached, all of which you are respectfully requested to acknowledge service.

DANIEL T. HAGAN,
PETER W. McKIERNAN,
Attorneys for Petitioners.

Receipt of a copy of the above notice and of said petition and brief in support thereof acknowledged this — day of April, A. D. 1926.

UNITED STATES OF AMERICA,
Respondent,

By —— ——.

Receipt of a copy of the record in the above case is hereby acknowledged this — day of April, A. D., 1926.

IN THE

SUPREME COURT OF THE UNITED STATES.

No.

OCTOBER TERM, 1925.

WILLIAM EARL DODGE ET AL., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, *Libellant, Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Supreme Court of the United States:

Your petitioners, William Earl Dodge and Joshua T. Dodge, of the Town of New Shoreham, County of Newport and State of Rhode Island, hereby make application to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, to review the judgment of said First Circuit, dated March 3, 1926, which judgment reversed a decree of the District Court for the District of Rhode Island, and for their petition therefor respectfully show as follows:

Questions Presented.

I. Whether the decree of said court is in conflict with the weight of authority.

II. Whether said decree decides an important question of Federal law which has not been, but should be settled by this Court.

III. Whether this Court shall grant said writ because said decision is in conflict with the decision of another circuit court of appeals on the same matter.

Statement of Case.

On March 5, 1925, the United States filed in the United States District Court for the District of Rhode Island, a libel of information against the motor boat "Ray of Block Island" for forfeiture under Section 26, Title II, of the National Prohibition Act.

The facts shewn at the hearing on July 24, 1925, on the motion of the appellees to dismiss were briefly:

On April 18, 1924, members of the police force of the city of Providence discovered Joshua T. Dodge and others aboard the "Ray" at a dock in said Providence; that said police officers then and there seized said boat and a quantity of intoxicating liquor which she had aboard; that on the same night said police officers removed the liquor from said vessel and took it to the police station, about a mile away, in the said city of Providence; that prohibition officers were notified subsequently and several hours after the seizure, Federal prohibition agents visited the dock where they found one police officer guarding the "Ray." There was, at that time, no liquor aboard the vessel and none of the defendants arrested were at the scene, the defendants and the liquor having been taken from the vessel to the police station.

The boat was thereupon turned over to the Federal prohibition agents and the defendants were held all night at the police station. The following day the defendants were arraigned and some time subsequent thereto paid fines on charges of unlawfully transporting intoxicating liquor in violation of the National Prohibition Act. Thereafter, on March 5, 1925, a libel was filed against the vessel, which libel in paragraph marked "II" states "that said police officers then and there seized said intoxicating liquors and said motor boat," etc. * * *

A claim of the owners and also a lien claim of the mortgagee was subsequently filed and in the claim of the owners there was an allegation that the seizure of said vessel was in violation of law, and in addition thereto, said owners filed a motion to dismiss, setting up:

1. That seizure by police officers is without authority in law.

2. That there was no State authority to seize the boat or to forfeit the same.

3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

On the issue of the legality of the seizure raised by the motion to dismiss, hearing was held before Judge Brown in the District Court for the District of Rhode Island.

On July 24, 1925, the case was heard on motion to dismiss and on July 31, 1925, the opinion of the dis-

trict court was filed granting the claimants' motion to dismiss. August 1, 1925, the Government appealed from the decree ordering return of the boat.

WILLIAM EARL DODGE,
JOSHUA T. DODGE,
Petitioners.

DANIEL T. HAGAN,
Counsel.
PETER W. McKIERNAN,
Counsel.

DISTRICT OF RHODE ISLAND,
State of Rhode Island,
County of Providence, ss:

Joshua T. Dodge, being duly sworn, says that he is one of the petitioners in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

—— ——.

Sworn to before me this 13th day of April, 1926.
DANIEL T. HAGAN,
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
LIBELLANT, RESPONDENT.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The motor boat "Ray" was libelled under section 26, of the National Prohibition Act, after its owner, Joshua T. Dodge, had been convicted of a violation of the National Prohibition Act.

It appeared that said vessel was seized by the police of the city of Providence and certain liquors found thereon were removed from said vessel and a police officer was placed in charge of the boat at a dock in said city of Providence until the following day, when Federal prohibition agents took possession of the boat.

The motor boat "Ray" was a small gasoline craft and the claimant, Joshua T. Dodge, duly filed his claim and asked for the dismissal of the libel on the ground that the National Prohibition Act confines the duty of seizure of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and not recognized by a subsequent surrender of the vessel to Federal officers.

Also that there was no authority under said prohibition law to seize any boat or vehicle found transporting intoxicating liquor and that the forfeiture could be declared only in the event that the thing sought to be forfeited was legally taken into possession.

ARGUMENT.

The argument will be confined to the questions involved as follows:

1. Whether the decree of said court is in conflict with the weight of authority.

2. Whether said decree decides an important question of Federal law which has not been, but should be, settled by this Court.

3. Whether this Court shall grant said writ because said decision is in conflict with the decision of another circuit court of appeals on the same matter.

Point I.

The Decree is in Conflict with the Weight of Authority.

It is apparent from the decisions of the Federal courts that the weight of authority under this point today is that under section 26 of Title II of the National Prohibition Act, Federal officers only are empowered to make seizures of vehicles or vessels found violating the provisions of said section.

U. S. vs. Loomis, 297 Fed., 359 (9 C. C. A.).
U. S. vs. Thomas, 297 Fed., 362 (9 C. C. A.).
U. S. vs. One Reo Motor Truck, 6 Fed., 2d, 412, Dis. Ct., Morton, J.

In the case of U. S. *vs.* Loomis, *supra*, the court held that the general rule is that a statute whereby a man may be deprived of his personal property by way of a punishment, should be construed with strictness; hence, those who assume authority to take possession of such property should have clear warrant for their action.

Section 26 of Title II of the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138½ mm) does not expressly mention officers of the State or any local subdivision thereof, and that in the absence of including words the construction of the court is that, in using the language set forth in said section, Congress confined the duty of seizure of automobiles to officers of the United States only.

The Ninth Circuit Court in this case sets forth the various provisions of the Volstead Act indicating the

intent of Congress to narrow and confine the question of seizures to officers of the United States only. The court further compares various statutes of the Federal Government containing broader terms in which police officers and other officers of the State are allowed to enforce Federal statutes, and in construing section 26 confines the construction to the general rule of strictness where the common law rights of a citizen have been abrogated.

The court in its final paragraph says that it has considered the decision of the Fifth Circuit in the case of *U. S. vs. Story*, 294 Fed., 517, where it was held that police officers might make these seizures in behalf of the Government and concludes:

> "but necessity of adherence to the rule of strict construction constrains us to hold that the police authorities were not empowered to make the seizure."

This same court decided the case of U. S. vs. Thomas, *supra*, on the same grounds.

Against these decisions already cited is the case of U. S. *vs.* Story, 294 Fed., 517, decided several months prior to the Loomis decision, and in those in conflict with the Loomis decision, the court holds that the provision of Section 26 of Title II of the National Prohibition Act are not exclusive but are cumulative remedies. The court holds further that the regularity of the seizure is not a necessary condition to condemnation if there is sufficient ground for an adjudication of forfeiture.

The Story case is based upon a construction of "The Caledonian," decided by this Court in 4 Wheaton, 101; 4 L. Ed., 523. This case decides that regardless of who seizes, the Government may adopt the seizure, and if it does and a case of forfeiture is shown to exist, condemnation will follow, notwithstanding the seizure was by an unauthorized person.

Upon examination it will be found that the Circuit Court of Appeals for the First Circuit in the present case, decided March 3, 1926, says:

> "We agree with the decision of the court below as to the construction of Section 26 of Title II of the Prohibition Act—that it confers authority only upon United States officers—but are of the opinion that it erred in dismissing the libel, as the United States, in taking over the vessel and filing the libel to enforce a forfeiture, ratified and adopted the acts of the police officers and thereby rendered the seizure lawful under Section 26," etc. • • •

It is conceded that the boat was empty at the time it was seized by the Federal officers.

In concluding this point, your petitioners therefore contend that the decree is in conflict with the weight of Federal decisions regarding Section 26 of Title II of the National Prohibition Act.

Point II.

Whether Said Decree Decides an Important Question of Federal Law Which has Not Been, but Should be, Settled by This Court.

It is apparent from the discussion of Point I that there is a question of Federal Law which should be decided by this Court. An examination of the authorities already cited shows that one line of Circuit Court decisions follows cases based upon "The Caledonian," *supra*, while another line of cases follows the sound reasoning laid down by the court in the case of U. S. *vs.* Loomis, *supra*.

Under the prior rule it will be seen that cases following "The Caledonian" frequently cite the cases of Taylor *vs.* U. S., 3 How., 197; 11 L. Ed., 559; Wood *vs.* U. S., 16 Pet., 342; 10 L. Ed., 987, and Gelston *vs.* Hoyt, 3 Wheaton, 246; 4 L. Ed., 381.

An examination of this case shows the fact that "The Caledonian" was a prize case, a case decided by this Court against a vessel charged with trading with the enemy in the time of war. It involved a violation of the neutrality laws, and it is a well-known fact, as was set forth in this case, that any citizen may seize any property *actually forfeited* to the use of the Government as a prize of war to enforce the forfeiture.

There is indeed a great distinction between enforcing forfeitures in cases where the thing to be forfeited is actually forfeited *ipso facto* because of a treaty or because of the Constitution and a forfeiture arising out of a statute which not only fails to provide for forfeiture *ipso facto*, but contains provisions for a release of property on bond.

In Gelston *vs.* Hoyt, *supra*, this Court stated that at common law any person may, at his peril, seize for a forfeiture to the Government, and if the Government adopt the seizure, and the *property is condemned*, he will be justified. The Court also held in that case that if the party be entitled to any part of the forfeiture, there could be no doubt that he would be entitled in that character to seize.

And, although this case is often cited as an authority contradictory of the theory in the Loomis case, on page 311, this Court said: "But there are express statutable provisions, which directly apply to the present case."

This, of course, clearly designates the ground upon which this case was decided, and the case, therefore, is not an authority for the rule *contra* to the law as laid down in U. S. *vs.* Loomis, *supra*.

In the case of Taylor *vs.* U. S., *supra*, the seizure was made by a customs officer, and the statement of the Court regarding common law seizures was pure dictum. On page 203 of the opinion it appears that the judge, in his charge in the lower court, instructed the jury, under Charge No. 7,

> "That under the Act of 1830, when a package or invoice has been made up with intention to defraud, the package or invoice (that is, the goods contained in the invoice) are forfeited."

There was no question in this case but what the officer who made the seizure was authorized by statute and the goods seized were forfeited *ipso facto*.

It is clear, therefore, that under the second point, since the passage of the National Prohibition Act,

there is a question of Federal Law which has not been decided, but which should be settled by this Court.

POINT III.

Whether This Court Shall Grant Said Writ Because Said Decision is in Conflict with the Decision of Another Circuit Court of Appeals on the Same Matter.

It is apparent from the foregoing that the Circuit Court of the Fifth Circuit, in the case of U. S. *vs.* Story, 294 Fed., 517, has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, namely, the construction of Section 26 of Title II of the National Prohibition Act.

The conflicting opinion is set forth in the case of U. S. *vs.* Loomis, 297 Fed., 359. The opinion of the Circuit Court in the case at bar upholds the Ninth Circuit on the question of the construction of the statute, yet adheres to the Story decision on the theory of seizure by adoption.

Conclusion.

The petitioners therefore pray that their writ of certiorari be granted for the causes herein set forth, and principally because Rule 35, Section 5 (B) of this Court, indicated the reasonableness of the request for a review.

Respectfully submitted,

DANIEL T. HAGAN,
PETER W. McKIERNAN,
Counsel for Petitioners.

Supreme Court, U.S.
FILED
MAY 1 1978
MICHAEL RODAK, JR., CLERK

No. [redacted] 341

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1978

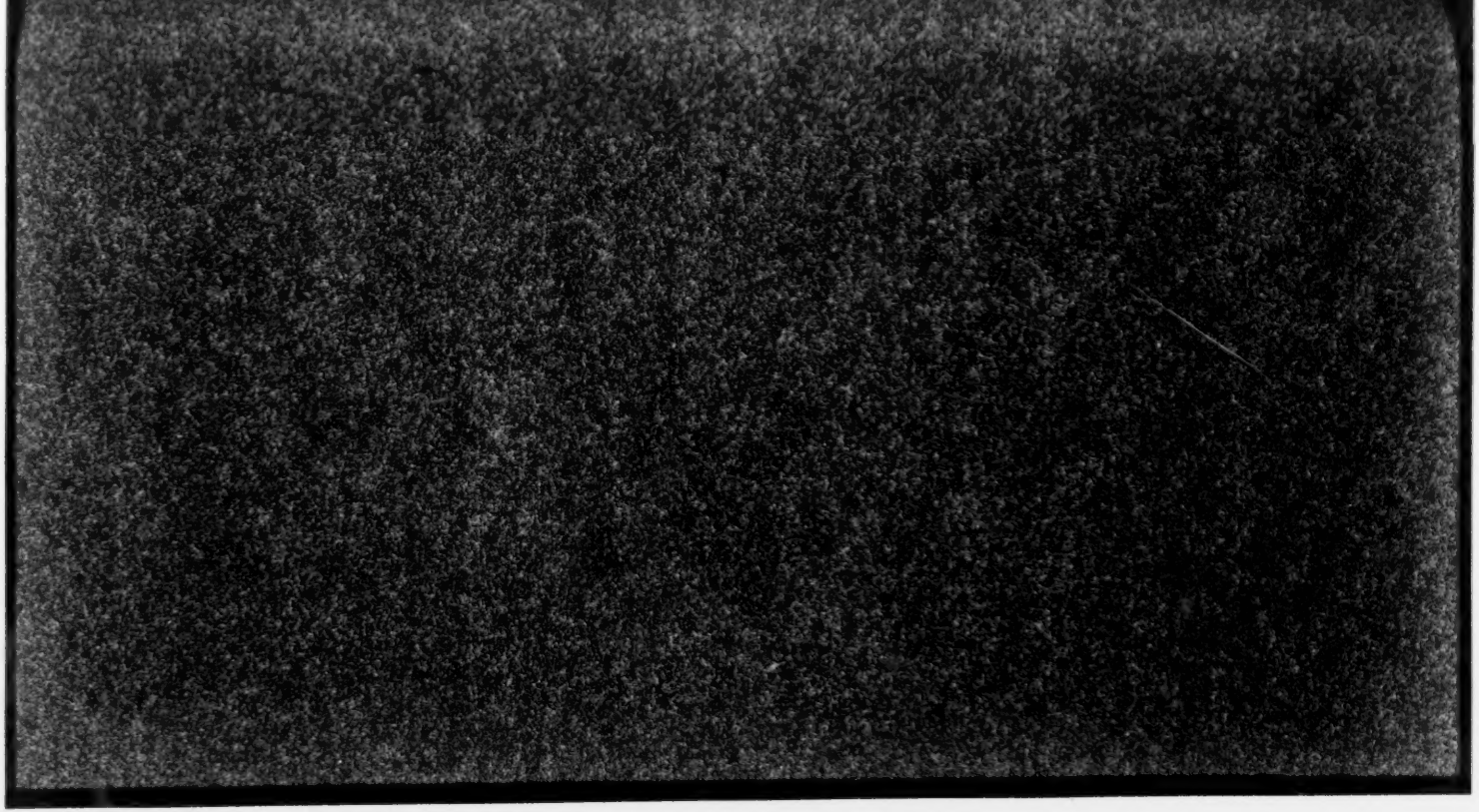
WILLIAM RAY DAVIS, JR., PETITIONER

v.

THE DAVEY SCREEN OF ARKANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

MEMORANDUM IN SUPPORT OF THE UNITED STATES



INDEX

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Question presented	4
Statute involved	4
Discussion	5
Conclusion	7

AUTHORITIES CITED

Cases:	
United States v. *Loomis*, 297 Fed. 359	5, 6
United States v. *Story*, 294 Fed. 517	5, 6, 7
Statutes:	
Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936	2
National Prohibition Act, c. 85, 41 Stat. 305, Title II, Sec. 26	4, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1132

WILLIAM EARL DODGE ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit has not yet been officially reported, but is found in the record at page 23. The opinion of the District Court for the District of Massachusetts is reported in 7 F. (2d) 189, and is printed in the record at page 10.

JURISDICTION

The final judgment or decree whose review is sought was entered by the Circuit Court of Appeals on March 3, 1926 (R. 26), and on March 29 the Circuit Court of Appeals ordered a stay of its mandate on condition that the petitioners in this Court file their petition for writ of certorari within twenty days (R. 27).

The petitioners are applying to this Court for a writ of certiorari pursuant to the authority granted by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936.

STATEMENT

The facts in this case are undisputed. On April 18, 1924, certain police officers of the City of Providence, Rhode Island, discovered one Joshua T. Dodge in the act of illegally transporting liquors in the motor boat *Ray of Block Island* on the Providence River and within the District of Rhode Island. Dodge, who was one of the owners of the vessel, was arrested, the boat and its cargo of intoxicating liquor were seized, and thereafter the prisoner and the seized property were turned over by the Providence police officers to the officers of the Federal Government. The motor boat, after being unladen by the municipal police, was delivered into the custody of Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island, and a criminal information was filed in the Federal court charging Joshua T. Dodge with the illegal transportation of intoxicating liquor in said vessel, contrary to the provisions of the National Prohibition Act.

On December 10, 1924, Joshua T. Dodge was convicted of illegally transporting intoxicating liquor on the information heretofore mentioned, and on March 5, 1925, the United States Attorney for the District of Rhode Island filed a libel against the

motor boat *Ray of Block Island*, claiming its forfeiture to the United States under the provisions of Section 26, Title II, of the National Prohibition Act. (R. 3–4.)

On April 7, 1925, William Earl Dodge and Joshua T. Dodge intervened in the aforesaid libel proceedings as claimants, alleging that they were the owners of said motor boat (R. 7), and on the same day these claimants filed an answer (R. 9), admitting all the averments of fact which were contained in the libel, but denying that they constituted cause for forfeiture.

Acting upon a motion to dismiss (R. 8), which was filed by the claimants at the same time they filed their answer, the District Court, on August 1, 1925, ordered the libel to be dismissed and further decreed that the United States Marshal should deliver the motor boat *Ray of Block Island* into the possession of said claimants (R. 16).

On August 20, 1925, the United States entered its appeal from the adverse decree of the District Court (R. 17), and on March 3, 1926, the United States Circuit Court of Appeals for the First Circuit reversed the decree of the court below and ordered the case remanded for further proceedings (R. 26). On March 29, 1926, upon motion of counsel for the claimants, the Circuit Court of Appeals stayed its mandate (R. 27), and on April 16, 1926, the said claimants filed a petition in this Court praying that a writ of certiorari be directed to the Circuit Court of Appeals to bring up the record.

QUESTION PRESENTED

The sole question at issue in this case is, whether or not a vessel or vehicle used in illegally transporting intoxicating liquor and seized by officers of the law who are not Federal officers, may be forfeited to the United States under the provisions of Section 26, Title II, of the National Prohibition Act.

STATUTE INVOLVED

Section 26, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305, 315) provides in part:

> When the commissioner, his assistant, inspectors, or *any officer of the law* shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to

return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, * * *. (Italics ours.)

DISCUSSION

The views of various Circuit Courts of Appeals which have passed upon this question are not uniform.

The case first raising the question in any Circuit Court of Appeals was *United States* v. *Story,* 294 Fed. 517, decided in the Fifth Circuit on November 30, 1923. In the *Story case* the court decided that the words " any officer of the law," in Section 26 of Title II of the National Prohibition Act were broad enough to include and did include state officers as well as Federal officers, and that a vehicle seized by state officers in the act of transporting intoxicating liquors and subsequently surrendered to Federal officers could be forfeited under Section 26.

The next case on the subject was *United States* v. *Loomis,* 297 Fed. 359, decided by the Circuit Court of Appeals for the Ninth Circuit on March 28, 1924. In this case the Circuit Court of Appeals specifically disapproved of the law announced in the *Story case,* and reached an opposite conclusion. It was held in the *Loomis case* that

Section 26 of Title II of the National Prohibition Act did not authorize any officers except Federal officers to seize a vehicle transporting intoxicating liquor contrary to the provisions of the National Prohibition Act. The Ninth Circuit Court of Appeals held that such a seizure of a vehicle by a state officer was illegal and that the property seized could not be forfeited to the United States because it was not lawfully taken into possession. The court specifically disapproved the application of the principle of adoption which was mentioned by way of dictum by the United States Circuit Court of Appeals for the Fifth Circuit in the *Story case*.

We now have a third variation of interpretation in the opinion of the Circuit Court of Appeals for the First Circuit in the instant case. This Circuit Court of Appeals does not agree with either one of the other appellate courts which have passed upon the question. In the case at bar the Circuit Court of Appeals holds with the Ninth Circuit and contrary to the Fifth Circuit that Section 26 of Title II of the National Prohibition Act does not authorize state officers to seize vehicles found transporting intoxicating liquors, but it approves the principle that Federal officers may lawfully adopt a seizure made by state officers and that such an adopted seizure may be made the basis of forfeiture proceedings. On the question of adoption the court disagrees with the conclusions of the Ninth Circuit in the *Loomis case*, and approves the

dictum on that subject announced by the Fifth Circuit in the *Story case*.

CONCLUSION

In view of the conflict of decisions in three Circuit Courts of Appeals, it is believed that under Rule 35, paragraph 5, of this Court the instant case may be of such a nature that the sound judicial discretion of this Court may properly be exercised by directing the issuance of a writ of certiorari. Therefore, the Government does not oppose the granting of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

APRIL, 1926.

Office Supreme Court, U. S.
FILED
OCT 19 1926
WM. R. STANSBURY
CLERK

No. 341

In the Supreme Court of the United States

OCTOBER TERM, 1926

WILLIAM EARL DODGE ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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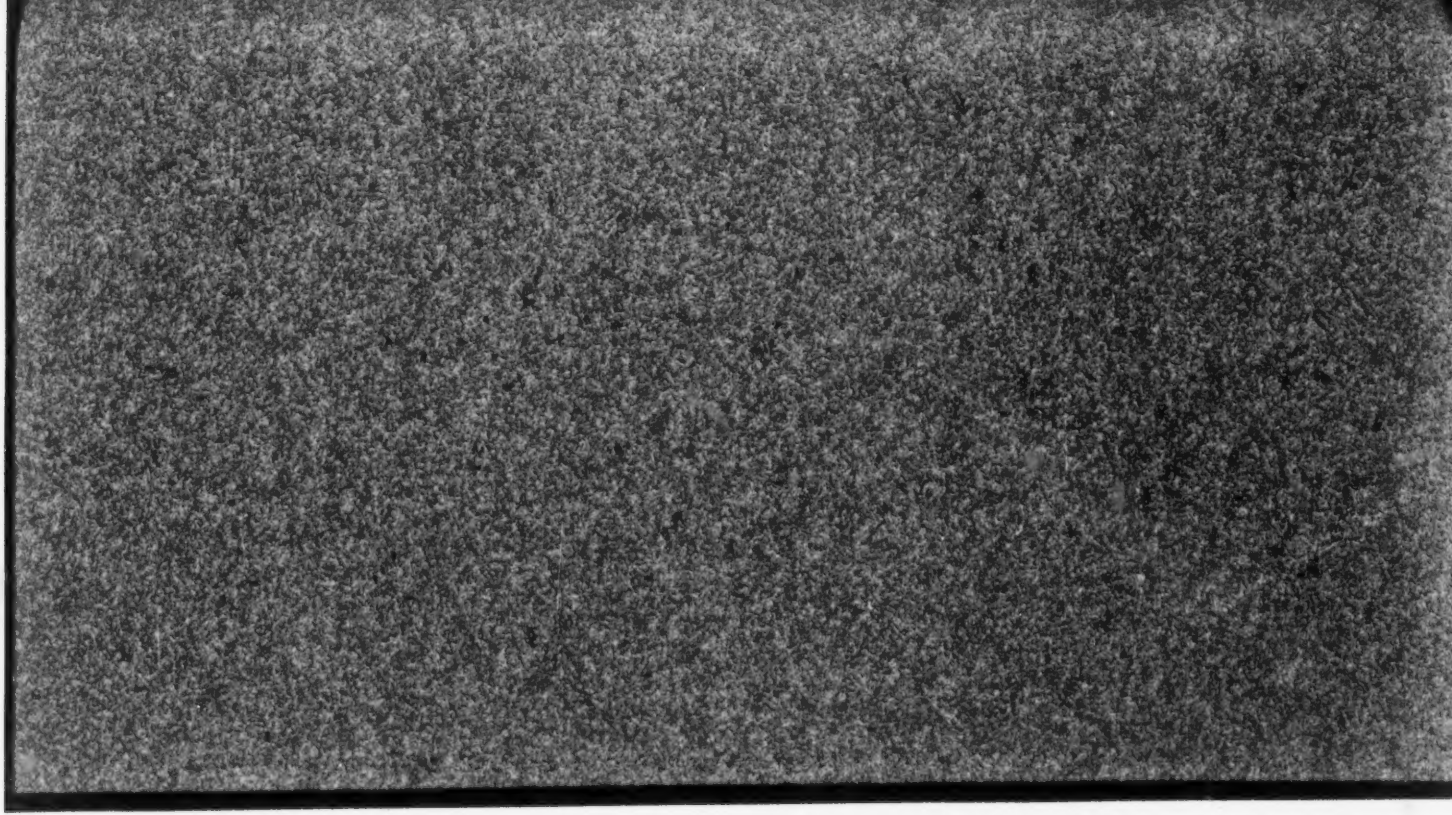

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement of the case	2
Statutes involved	5
Summary of argument	7
Argument:	
I. The conflicting decisions of the fifth, first, and ninth circuit courts of appeals concerning forfeitures under section 26 of the national prohibition act	8
II. An unauthorized seizure for forfeiture becomes valid when adopted by the Government and forfeiture is adjudged	18
III. Jurisdiction to adjudge a forfeiture of seized property is in no way dependent upon the legality of the seizure	23
IV. The libel alleged a sufficient ground for forfeiture under section 26	28
Conclusion	35

AUTHORITIES CITED

Cases:	
Caledonian, The, 4 Wheat. 99	12, 20
Coffey v. *United States*, 116 U. S. 436	32
G–883, The (R. I.), 6 F. (2d) 416	34
Gelston v. *Hoyt*, 3 Wheat. 246	12, 19
Goulis v. *Judge of Third District Court*, 246 Mass. 1	15
Merino, The, 9 Wheat. 390	26
Sagatind, The (S. D., N. Y.), 4 F. (2d) 928	26
Ship Richmond, The, 9 Cranch. 102	25
Taylor v. *United States*, 3 How. 197	14, 25
Underwriter, The (C. C. A., 2nd), 13 F. (2d) 433	26
United States v. *Loomis* (C. C. A., 9th), 297 Fed. 359	4, 11
United States v. *One Studebaker Seven-Passenger Sedan* (C. C. A., 9th), 4 F. (2d) 534	13, 26
United States v. *Story* (C. C. A., 5th), 294 Fed. 517	4, 26, 32
United States v. *Title Insurance & Trust Co.*, 265 U. S. 472	22
Wood v. *United States*, 16 Pet. 341	24

Statutes: Page

Act of September 13, 1888 (c. 1015, 25 Stat. 479), section 13 17
Judicial Code, section 240 (a), as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938 1
National prohibition act (act of October 28, 1919, c. 85, 41 Stat. 305), Title II:
Section 2 15
Section 3 2
Section 26 ..... 5, 7
Revised Statutes, section 1014 6
Cong. Rec., 66th Cong., vol. 58, part 3, p. 2901 15

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 341

WILLIAM EARL DODGE ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court is reported in 7 F. (2d) 189, and that of the Circuit Court of Appeals is reported in 11 F. (2d) 522. These opinions will also respectively be found at pages 10–16 and 23–25 of the record.

JURISDICTION

On May 18, 1926, this Court granted a petition for a writ of certiorari in this case pursuant to the authority conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938). On June 1, 1926,

the case was placed on the summary docket for argument on October 25, 1926.

QUESTION PRESENTED

The question in this case is whether a vessel seized in the act of transporting intoxicating liquor in violation of the National Prohibition Act by police officers of a State who are not Federal officers may be forfeited to the United States under Section 26, Title II, of that act.

On account of conflict between Circuit Courts of Appeals the United States did not oppose the issuance of a writ of certiorari.

STATEMENT OF THE CASE

The United States filed its libel in the District Court of the United States for the District of Rhode Island, under Section 26, Title II, of the National Prohibition Act, to forfeit the motor boat *Ray of Block Island*, her engines, tackle, apparel, and furniture. The libel alleged that said motor boat was discovered by police officers of the city of Providence, Rhode Island, while in the act of transporting intoxicating liquor, in violation of Sections 3 and 26 of Title II, on the Providence River, a navigable water of the United States within the limits of said city; that the said officers thereupon seized the liquor and motor boat and also took into custody one Joshua Trueman Dodge, who was in charge of the boat; that Dodge was later arrested by officers of the United States and was thereafter

convicted in the Federal court of transporting the liquor in violation of Section 3 and sentenced to pay a fine of $500, which he paid, and that the motor boat was turned over to the Federal Prohibition Director, by whom it was held within the jurisdiction of the court. (R. 2–4.)

Petitioners here appeared as claimants of the boat and filed an answer in which they admitted the above averments of the libel, but denied that such averments showed a sufficient basis for forfeiture. (R. 7–8, 9.) They also filed a motion to dismiss the libel upon the following grounds (R. 8–9):

> 1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to federal officers.
>
> 2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.
>
> 3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

Following a hearing upon the foregoing motion, the District Court rendered an opinion in which it held, in substance, that unless the police officers who made the seizure in this case came within the term "any officer of the law," as used in Section 26, Title II, of the National Prohibition Act, the seizure by

them of the motor boat in question was without authority of Federal law; that while in the case of *United States* v. *Story*, 294 Fed. 517, the Circuit Court of Appeals for the Fifth Circuit had construed the above phrase of Section 26 as broad enough to embrace state as well as Federal officers, the court was impressed with the correctness of the contrary conclusion reached in *United States* v. *Loomis*, 297 Fed. 359, wherein the Circuit Court of Appeals for the Ninth Circuit referred to, but declined to follow, the *Story case* decision and affirmed a decree which denied the right of the United States to forfeit an automobile because seized by state officers; that, in view of the concession in argument in this case that there was no law of the State of Rhode Island authorizing such a seizure, it was evident that the seizure by the police officers was unauthorized either by state or Federal law, and that, therefore, the Government's libel for forfeiture would not lie. (R. 10–16.) The motion to dismiss was accordingly sustained and a final decree entered ordering delivery of the boat to the claimants. (R. 16.)

Upon appeal by the Government, the Circuit Court of Appeals agreed with the District Court that the phrase of Section 26, "any officer of the law," was confined in its application to Federal officers of the law. The appellate court held, however, that the District Court had erred in dismissing the Government's libel because the adoption by the Government of the act of the police officers in

seizing the motor boat at a time when it was engaged in transporting intoxicating liquor in violation of the National Prohibition Act, had the effect of rendering the seizure legal. (R. 23–26.) The decree of the District Court was therefore reversed and the cause ordered remanded for futher proceedings (R. 26), whereupon a writ of certiorari was issued by this Court.

STATUTES INVOLVED

Section 26, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 315), provides, so far as pertinent in this case, that—

> When the commissioner, his assistant, inspectors, or *any officer of the law* shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the

value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. * * *

Section 1014 of the Revised Statutes reads:

For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the

usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

SUMMARY OF ARGUMENT

The phrase "any officer of the law," contained in Section 26, Title II, of the National Prohibition Act, is the only provision of Federal law which by any reasonable construction could be held to authorize state officers to seize a vehicle found transporting intoxicating liquor in violation of that Act.

The Fifth Circuit Court of Appeals has held that Section 26 authorizes state officers to make seizures. The Ninth Circuit has held that it does not, and that the Government may not condemn property seized by state officers. The Circuit Court of Appeals for the First Circuit, in the instant case, finds no warrant in Section 26 of the National Prohibi-

tion Act or other Federal laws for state officers to seize vehicles for forfeiture, but holds that the United States may adopt, and in the instant case has adopted, the seizure by state officers, and that forfeiture under Section 26 of the National Prohibition Act may lawfully rest thereon. The latter seems to us the sounder reasoning.

Even if the adoption by the United States of the seizure did not have the effect of validating it from the beginning, nevertheless the jurisdiction of the District Court to adjudge a forfeiture of the motor boat was in no way impaired by the fact that the seizure of the boat was unauthorized.

The requirements of Section 26, the failure to comply with which on the part of the Government, petitioners assert, deprived the District Court of jurisdiction to adjudge a forfeiture of the motor boat, are mere directory provisions which impose duties upon the seizing officers, but have no bearing upon the jurisdiction of the court of a libel for forfeiture under that section.

ARGUMENT

I

The conflicting decisions of the Fifth, First, and Ninth Circuit Courts of Appeals concerning forfeitures under Section 26 of the National Prohibition Act

The Circuit Court of Appeals for the Fifth Circuit has held that state officers come within the authority conferred by Section 26. The Circuit Court of Appeals for the Ninth Circuit has held

that they do not, and that accordingly no condemnation of property may be based upon seizure by state officers. The Government is inclined to believe that the decision of the Circuit Court of Appeals for the First Circuit in this case is supported by the better reasoning. In view, however, of the conflict of decisions between the Circuit Courts of Appeals for the First, Fifth, and Ninth Circuits upon the question of the sufficiency of libels based upon seizures by state officers under Section 26, it is deemed proper to present the three views to this Court for its consideration and decision as to the correct rule of law to apply to forfeiture proceedings under Section 26. As of possible aid to the Court in reaching a conclusion, there is submitted herewith a statement of the conflicting decisions, together with some discussion of each and the reasons which the Government regards as indicating that the question was rightly decided below.

It is conceded in the record in the instant case that the seizure was not authorized by the state law. Whether it was authorized by Federal law is dependent, under the facts, upon whether it was sanctioned by Section 26, Title II, of the National Prohibition Act, and the language of that section which by reasonable intendment might be held to confer authority upon state officers to seize vehicles under that section is the phrase "any officer of the law." The District Court construed that phrase as embracing only Federal officers, and accordingly held that the seizure was not authorized by Section

26. Relying upon the *Loomis* decision, the District Court went further and sustained the motion to dismiss on the ground that the legality of the seizure was essential to sustain a condemnation of the property. The Circuit Court of Appeals agreed with the District Court that Section 26 imposes no duty upon officers other than those of the United States, but held that the action of the United States in taking over the seized property ratified the original seizure by state officers and made it lawful.

In the *Story case* (294 Fed. 517), decided November, 1923, by the Circuit Court of Appeals for the Fifth Circuit, the claimant was convicted of transporting liquors in an automobile, but no order condemning the car was made by the court in the criminal case. Later, forfeiture proceedings were filed and resisted by Story upon the grounds that the seizure of the car could not be lawfully made by state officers and that the subsequent surrender of the car to the United States Marshal did not authorize its condemnation by the Government. The District Court sustained these objections and dismissed the libel. That action was overruled by the Circuit Court of Appeals in an opinion stating that it was evident from the language of Section 26 of the National Prohibition Act "that Congress did not provide for the enforcement in Section 26 by Government officers and Federal courts exclusively." Further support for the view that Congress intended to allow state officers to make seizures was stated as follows (p. 519):

> The Eighteenth Amendment vests concurrent enforcement powers in the states, through either their legislative bodies or public officers. *National Prohibition cases*, 253 U. S. 350. Section 2 of Title II adopts Section 1014 of the Revised Statutes as part of the procedure applicable to the enforcement of the act. Section 1014 provides for the arrest of offenders against the laws of the United States by state magistrates, * * *. It seems clear that Congress contemplated the enforcement of the amendment and of enforcement legislation through state officers as well as through federal officers.

In another paragraph of the opinion, reversal of the District Court's dismissal of the libel was based upon the further reason that—

> The regularity of the seizure is not a necessary condition to a condemnation of the thing seized, providing there is sufficient ground for an adjudication of a forfeiture. Property may be seized by a private person, acting at his peril, and if a cause or forfeiture is shown to exist against it, condemnation will follow, notwithstanding the seizure was by an unauthorized person. *The Caledonian*, 4 Wheat. 101; *Wood* v. *United States*, 16 Pet. 342; *Taylor* v. *United States*, 3 How. 197.

The Ninth Circuit Court of Appeals rendered a contrary decision in March, 1924, in *United States* v. *Loomis*, 297 Fed. 359. In that case it appeared that Loomis had pleaded guilty to transporting

intoxicating liquor in an automobile. No disposition of the car was made in the criminal proceedings. Some weeks after the police officers of Seattle had made the seizure the car was turned over to Federal authorities, who petitioned in the Federal District Court for an order of forfeiture and sale. The petition was dismissed by the District Court. That action was upheld by the Circuit Court of Appeals, which said:

> The general rule is that a statute whereby a man may be deprived of his personal property by way of punishment should be construed with strictness; hence, those who assume authority to take possession of such property should have clear warrant for their action. Section 26 of Title II does not expressly mention officers of the state or any local subdivision thereof, and in the absence of including words our construction is that * * * Congress confined the duty of seizure of the automobile to officers of the United States.

From that premise the court reasoned that in a libel to forfeit the car "the lawfulness of the seizure will be inquired into," and further announced that "Forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession." In this connection the Circuit Court of Appeals, after examining the opinions of this Court in *The Caledonian* and *Gelston* v. *Hoyt,* wherein Justice Story stated the common-law rule to be that any person might at his peril seize for forfeiture

to the Government, held them inapplicable to condemnation proceedings under Section 26. The court further mentioned but declined to follow the reasoning in the *Story* case.

It is here interesting to note that, although in 1924 the Circuit Court of Appeals for the Ninth Circuit in the *Loomis* decision spoke thus generally on the subject of forfeitures and repudiated the ancient doctrine of adoption, whereby a seizure, whether legal or not, when taken over by the United States becomes a proper foundation upon which an order of forfeiture and sale may be rested, they later narrowed their views in an opinion delivered in March, 1925, in the case of *United States* v. *One Studebaker Seven-Passenger Sedan*, 4 F. (2d) 534. This was a case where the facts were almost identical with those in the *Loomis* case, but the proceeding to condemn the car was brought under Section 3450 of the Revised Statutes. The libel, which disclosed that the seizure was made by police officers of the city of Spokane, was dismissed by the district judge on the authority of *United States* v. *Loomis*. On appeal, the Circuit Court of Appeals for the Ninth Circuit, considering their prior *Loomis* decision, said:

> It must be conceded that the discussion in the opinion extended to forfeitures generally, but that part of the discussion was mere *dicta*, and *upon further consideration* we are convinced that seizure by a United States revenue officer is not a necessary prerequisite to a forfeiture under Section 3450.

As authority for their somewhat changed attitude they set out an extended quotation from the case of *Taylor* v. *United States*, 3 How. 197, which announces the doctrine that—

> It is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, *provided the adjudication is for a sufficient cause*.

Despite the *Loomis* case, the Circuit Court of Appeals for the Ninth Circuit concluded its opinion in the *Studebaker* case by stating—

> The fact, therefore, that the original seizure was made by police officers constituted no defense to the proceeding.

The Circuit Court of Appeals for the Fifth Circuit held that state officers may, under the authority of Section 26, seize automobiles transporting liquor contrary to the Federal law because it was the intent of Congress to give them such right. The views expressed in the *Story* case arise because Congress when dealing with the most difficult phase of prohibition enforcement—to wit, transportation of liquor by fast-moving vehicles—is presumed to have used every possible agency to apprehend such illegal transportation. Manifestly there are but few Federal agents in comparison to the hundreds of state, city, and county officers who may be in a position to "discover" in the words of the Act itself "any person in the act of transporting" intoxicating

liquors. It is not unusual for Congress to provide in Federal legislation for the use of state facilities to carry out the terms of a Federal law. (See Revised Statutes, Section 1014, and Section 2 of Title II of the National Prohibition Act, under which officers may issue warrants of arrest and search warrants.) And for a discussion of the principles involved in the use of state agencies to carry out Federal law, see *Gentis* v. *Judge of Third District Court*, 246 Mass. 1.

Judge Grubb's conclusion in the *Story* opinion that Congress intended by the term "or any officer of the law" in Section 26 to extend the authority of seizure under that section to state officers, is further supported by the fact that when the Volstead Act was before the House for discussion it was referred to as authorizing "the sheriff or other officer" to seize any conveyance in which liquor is transported. (See Cong. Rec. 66th Cong., Vol. 58, Part 3, p. 2904.)

The *Story* opinion upheld the libel because authority was given to state officers to seize vehicles under Section 26, but the decision does not rest upon that conclusion, as ample support for it is found in authorities cited by the court which uphold the theory that it is not material who seizes a forfeitable article later libeled by the Government. The conflict presented to this Court is, therefore, not whether by fair intendment Section 26 of the National Prohibition Act permits or sanc-

tions seizure of cars by state officers as well as Federal, but whether even if no such authority for state officers to act can be found within the terms of that section, a seizure made by such officers must so taint with illegality the proceedings later taken by the Government that forfeiture will fail. Notwithstanding that there is some support for the view adopted in the *Story case*, that state officers are specifically authorized to seize cars under Section 26, the Government is of the opinion that the sounder reasoning is to be found in the instant case. It is difficult in reading Section 26, with the mandatory expressions used therein and the specific instructions applicable to "officers" concerning release of the car and approval of bond given therefor, to believe that, when using such language, Congress could have intended to speak to state officers as well as Federal. It is not necessary, as is assumed by the Circuit Court of Appeals for the Ninth Circuit in the *Loomis case*, to decide the question whether under the National Prohibition Act the local officer was *under a duty* to take possession of the automobile and arrest the person in charge. It is only necessary to examine the statute to see whether Congress conferred authority upon state officers to do so. The expressions "shall" and "must" are used throughout Section 26. It seems that such mandatory language would be chosen to direct officers immediately under the control of the Federal Government rather than to confer a privilege or grant an authority to state officers. While

weighing the reasoning advanced in support of the construction given in the *Story case*, there arises in one's mind a comparison of the wording Congress has thus chosen for Section 26 with that which was used in Section 13 of the Act of September 13, 1888 (c. 1015, 25 Stat. 479):

> All peace officers of the several States and Territories * * * are hereby invested with the same authority in reference to carrying out the provisions of this Act as a marshal or deputy marshal of the United States, * * *.

In the Act of 1888 there can be no mistake about the clear intent of Congress to enlist the services of state officers in so far as a grant of authority to them to act under Federal sanction can enlist their aid. No such clear statement is to be found in Section 26.

When petitioners applied for a writ of certiorari in this case the Government made no opposition to the granting of the writ because of the ground set up, to wit, a conflict of decision between various circuit courts of appeals. The real conflict is between the Circuit Court of Appeals for the Ninth Circuit in the *Loomis case* and that of the First Circuit in the instant case, and the real difference is in the conclusions drawn by these two circuit courts from the same premise, to wit, that Section 26 gives no specific authority to state officers to seize automobiles transporting liquor in violation of Federal law. In the instant case the First Circuit Court

concludes that without such authority the Federal Government may freely adopt seizures made by state officers and base forfeiture proceedings thereon. The Ninth Circuit Court in the *Loomis case* concludes that since Section 26 gives no authority to state officers seizures made by them can not be used by the Federal Government. The Ninth Circuit Court is in error in drawing this conclusion as a necessary effect of seizure by state officers.

The Ninth Circuit Court is further in error in assuming that in a forfeiture proceeding by the Government the person who makes the seizure is an issue. In the *Studebaker Sedan case*, decided in the Ninth Circuit a year later, the true rule is stated that the fact that police officers made the original seizure constituted no defense to the proceeding. This rule should not be limited as was done in the *Studebaker* decision to libels under Section 3450. It applies likewise to forfeiture proceedings under Section 26 of the National Prohibition Act.

II

An unauthorized seizure for forfeiture becomes valid when adopted by the Government and forfeiture is adjudged

It is settled that where property declared by Federal statute to be forfeited because used in violation of Federal law is seized for forfeiture by one having no authority to do so, the seizor is exonerated from liability to the claimant of the property

if the seizure is adopted by the United States and the property is thereafter condemned as forfeited to the United States.

Gelston v. *Hoyt*, 3 Wheat. 246, 310–311.
The Caledonian, 4 Wheat. 99, 101.
Taylor v. *United States*, 3 How. 197, 205.
United States v. *One Studebaker Seven-Passenger Sedan* (C. C. A., 9th), 4 F. (2d) 534, 535.
The G-883 (R. I.), 6 F. (2d) 416.

In *Gelston* v. *Hoyt*, here cited, an action was brought in a court of the State of New York to recover damages from certain customs officers for the alleged illegal seizure by them of the plaintiff's vessel in New York harbor. The defendants sought by plea to justify their seizure on the ground that, acting under color of their respective offices as Collector of Customs and Surveyor of the port of New York, they had seized the vessel as forfeited under an act of Congress because it was being fitted out for service by one foreign nation in belligerent operations against another with which the United States was at peace. The trial court sustained a demurrer to the plea and judgment went for the plaintiff. Upon the affirmance of the judgment by the state court of last resort, the defendants sued out a writ of error from this Court, assigning, among other claimed errors, that the state courts had erroneously sustained the demurrer to their plea. In deciding the case, this Court, in an opinion handed down by Mr. Justice Story, declared that in

order to establish the admissibility of the plea it was incumbent upon the defendants to sustain the affirmative of four propositions, the last of which was that they had the right to make the seizure. Regarding that proposition, the Court said (pp. 310–311):

> Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the government; and if the government adopt the seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227; *Roe* v. *Roe*, Hardr. 185; *Malden* v. *Bartlett*, Parker 105; though *Horne* v. *Booscy*, 2 Str. 952, seems contra.)

In the case of *The Caledonian, supra*, the United States obtained a decree of forfeiture against an American vessel which had been seized at Newport, Rhode Island, by the Collector of Customs at that port for having on board and using a British license, for trading with the enemy, etc. Upon appeal by the claimant, this Court declared that the case involved but two questions: Whether the ship was liable to seizure for the asserted forfeiture after her arrival in port, and, if so, whether the collector had authority to make the seizure. Holding that, by virtue of her British license, the vessel was to be regarded as an enemy ship and that

she had not become immune from seizure for forfeiture merely because she had succeeded in making an American port before being seized, this Court disposed of the second question by saying (p. 101):

> In respect to the other point, it is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command.

In *Taylor* v. *United States*, also above cited, the property libeled by the United States had been seized by the Collector of Customs of the port of Philadelphia as forfeited because having been fraudulently entered at the port of New York. From a judgment for the United States, the claimants brought the case upon writ of error to this Court, where they asserted that the seizure was illegal because the Collector at the port of New York alone had authority to seize under the circumstances. Overruling the contention, this Court held that under the Act of 1799 a collector of customs unquestionably had authority to seize goods found

within his own district, and furthermore declared (p. 205):

> But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified.

Petitioners seek to brush aside the foregoing rulings of this Court by asserting that the seizures in those cases were sanctioned by the law of prize, or were specifically authorized by statute, and that what this Court said regarding the validating of seizures made without authority of law was unnecessary to the decisions and therefore *obiter dictum*. But the general principle of law referred to by this Court was plainly regarded by it as applicable to all seizures for forfeiture and was given as an additional reason for holding that the seizures in those cases were legally justified. The observations quoted were, therefore, in no proper sense *obiter dicta*, for, as recently stated by this Court in *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486, "Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143."

III

Jurisdiction to adjudge a forfeiture of seized property is in no way dependent upon the legality of the seizure

In the *Loomis case,* heretofore cited, the Circuit Court of Appeals for the Ninth Circuit held that, as the seizure in that case was not authorized by Section 26, the decree of the District Court, denying a petition of the United States to forfeit the seized property, must be affirmed because "Forfeiture can only be declared if the thing sought to be forfeited was legally taken into possession." The latter holding was unsupported by any citation of authority or other discussion. In the instant case, the District Court, adopting the reasoning of the *Loomis case* decision to that extent, held that the seizure by the police officers was unlawful. It thereupon dismissed the libel without any reference to the question of whether an unlawful seizure precluded the right to forfeit the seized property. Upon appeal, the Circuit Court of Appeals also held that the seizure, as originally made, was unlawful, but ruled that the adoption of the seizure by the United States related back and made it lawful from the beginning. For the reasons stated in Points I and II of this brief, the Government believes that the decision of the Circuit Court of Appeals was correct upon both points. It furthermore respectfully submits, however, that the question of the legality or illegality of a seizure in no way affects the juris-

diction of a court to adjudge a forfeiture of property which the Government had in possession when the forfeiture proceedings were brought.

The point has been several times passed upon by this Court. In *Wood* v. *United States*, 16 Pet. 341, the Court answered the complaint, that the libeled goods had been seized upon a ground other than that for which their forfeiture had been decreed, by saying (p. 358):

> It is of no consequence whatsoever, what were the original grounds of the seizure, whether they were well-founded or not, if, in point of fact, the goods are by law subjected to forfeiture; for the United States are not bound down, by the acts of the seizors, to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if, in point of fact, the seizure can now be maintained, as founded upon an actual forfeiture thereof, at the time of the seizure, and therefore, it was rightly held by the judge, that no question arose upon the issues which the jury were to try, except upon the causes of forfeiture alleged in the information. The remarks just made constitute an answer to the argument upon the demurrers to the two first pleas of the claimant; for, as has been already suggested, if a seizure has been actually made, and is a continuing seizure, it is no bar to proceedings thereon, that the cause of forfeiture relied on is not the same upon which the seizure was originally made. It is sufficient for the United States, that it adopts the seizure and

> now proceeds for a good cause of forfeiture, although utterly unknown to the original seizors.

In *Taylor* v. *United States*, 3 How. 197, this Court, after declaring, as hereinbefore shown, that the adoption by the Government of a seizure for forfeiture and a subsequent condemnation completely justified the seizure, though originally unauthorized, furthermore stated (p. 205):

> It is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized in this court in *Hoyt* v. *Gelston*, 3 Wheat., 247, 310, and in *Wood* v. *United States*, 16 Pet. 342, 358, 359. And from these decisions we feel not the slightest inclination to depart.

In *The Ship Richmond*, 9 Cranch, 102, an American vessel seized by a United States gunboat in Spanish waters off the coast of Florida was libeled for forfeiture for violation of the Nonintercourse Act. It was urged that the libel would not lie because the seizure within the waters of a foreign nation was illegal. Chief Justice Marshall, speaking for this Court, replied, however (p. 103):

> The seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offense against that power, which must be adjudged between the

> two governments. This court can take no cognisance of it; and the majority of the court is of opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel.

In *The Merino*, 9 Wheat. 390, the right of the United States to libel certain American vessels seized in Spanish waters for transporting slaves in violation of a law of the United States was similarly challenged on the ground that the seizure was illegal, but this Court said (p. 401):

> The illegality of the service in this latter case has nothing to do with the question of jurisdiction, as was decided by this Court in the case of *The Richmond*. (9 Cranch, 102.)

Similar decisions were rendered in *United States* v. *Story* (C. C. A., 5th), 294 Fed. 517, 519; *The Sagatind* (S. D., N. Y.), 4 F. (2d) 928, 931; *United States* v. *One Studebaker Seven-Passenger Sedan* (C. C. A., 9th), 4 F. (2d) 534; and *The Underwriter* (C. C. A., 2nd), 13 F. (2d) 433, 434. In the *Story* case, heretofore cited in another connection, it was said:

> The regularity of the seizure is not a necessary condition to a condemnation of the things seized, providing there is sufficient ground for an adjudication of a forfeiture. Property may be seized by a pri-

> vate person, acting at his peril, and, if a cause of forfeiture is shown to exist against it, condemnation will follow, notwithstanding the seizure was by an unauthorized person. *The Caledonian*, 4 Wheat. 101; *Wood* v. *U. S.*, 16 Pet. 342; *Taylor* v. *U. S.*, 3 How. 197.

In *The Sagatind*, where one of the counts of the libel for forfeiture was based upon Section 26, Title II, of the National Prohibition Act, District Judge Augustus Hand observed:

> I do not regard the seizure by the Commissioner, or some one acting under his authority, as mandatory. Any seizure is sufficient, if a ground of forfeiture existed to give the court jurisdiction.

And in the case of *The Underwriter* the Circuit Court of Appeals for the Second Circuit declared:

> The learned District Judge was in error in holding that the seizure must be lawful in its origin. The particular method used in bringing the vessel into the District of Connecticut was of no importance in so far as the jurisdiction is concerned. As it appears that the res was in the possession of the collector when the libel was filed, it is sufficient to support the jurisdiction of the libel. *The Caledonian*, 17 U. S. (4 Wheat.) 100; *Taylor* v. *United States*, 44 U. S. (3 How.) 197; *Wood* v. *United States*, 41 U. S. (16 Pet.) 342; *United States* v. *One Studebaker Sedan* (C. C. A.), 4 F. (2d) 534; *United States* v. *Story* (C. C. A.), 294 F. 517.

The cases here cited unmistakably establish that the jurisdiction of the District Court in the instant case to adjudge a forfeiture of the seized motor boat was in no way impaired by the unauthorized seizure of the boat by the police officers, even though it be assumed, for the sake of the argument, that the adoption of the seizure by the Government did not render it lawful as originally made. As the property sought to be condemned was in the custody of the court upon proper judicial process executed by the United States Marshal by taking over the property from the Federal Prohibition Director, the only matter which the court was called upon to determine upon the motion to dismiss was whether the libel alleged a sufficient ground for forfeiture. The libel prayed the forfeiture of the motor boat under and by virtue of the provisions of Section 26, Title II, of the National Prohibition Act. (R. 4.) In the next and final point of this brief, the Government proposes to show that the facts alleged in the libel were sufficient to justify the court in decreeing a forfeiture of the seized property, and that the Circuit Court of Appeals therefore correctly overruled the action of the District Court in dismissing the libel.

IV

The libel alleged a sufficient ground for forfeiture under section 26

The libel, which was filed March 5, 1925, alleged in substance that on April 18, 1924, police officers

of the city of Providence discovered one Dodge in the act of transporting, within the jurisdiction of the court, a large quantity of intoxicating liquor in violation of Sections 3 and 26 of Title II of the National Prohibition Act in the motor boat here in question; that said police officers seized the liquor and the motor boat and also arrested Dodge, who was in charge of the boat; that Dodge was subsequently arrested by United States officers and on December 10, 1924, was convicted in the Federal District Court of the offense of transporting said liquor in violation of Section 3, and that the motor boat was delivered to the Federal Prohibition Director, who held it in custody within the jurisdiction of the court. Petitioners assert that these facts do not show a sufficient ground for forfeiture under Section 26, because, before a forfeiture provided for by statute can be adjudged, it must appear that the statutory requirements were strictly complied with, and the facts alleged in the libel in this case show that the procedure prescribed by Section 26 was not followed.

Stated in the order in which they appear in Section 26, the requirements of that section which precede the direction to the court to order a sale of the seized property are as follows: (1) That an officer of the law discover a person in the act of transporting intoxicating liquor in violation of the law; (2) that such officer seize the liquor thus transported; (3) that he take possession of the vehicle; (4) that he arrest the person in charge of the

vehicle; (5) that he proceed at once under Title II in a court of competent jurisdiction against the person arrested; (6) that the vehicle be released upon a prescribed bond approved by such officer; (7) that the person arrested be convicted; (8) that the court order the liquor destroyed; and (9) that the owner fail to show good cause why the court should not order the seized property sold. To hold that each of these requirements must be complied with to give the court jurisdiction to order the vehicle sold, would render it impossible for the Government to obtain such a forfeiture in many cases where it had ample evidence that the vehicle had been used in transporting intoxicating liquor in violation of the Act. It would, for example, cut off the Government's right to have such a forfeiture adjudged wherever the discovering officer had died or had left the service and could not be found so that he could not be procured to proceed against the offender; or where such officer had overlooked seizing the liquor, or the liquor had been seized, or the vehicle taken into possession, or the person in charge arrested, by some other officer who had appeared on the scene of the violation too late to discover the actual illegal transportation. It would, moreover, deprive the court of power to order a sale of the vehicle, notwithstanding the conviction of the person in charge and the failure of the owner to "show good cause," unless the court had previously ordered the liquor destroyed.

Furthermore, if a strict compliance with the provisions of Section 26 were essential to authorize the court to adjudge such a forfeiture, then the libel filed in the instant case would have to be dismissed, even though every requirement above enumerated had been fulfilled, for the forfeiture provision of that section does not in terms authorize the filing of a libel for forfeiture, but merely directs the court to order a sale of the seized property, following a conviction of the person arrested and a failure of the owner of the property to show good cause why such order should not issue. Yet the practice of filing such libels, subsequent to the conviction of the person in charge of the vehicle and independently of the criminal action, has been generally followed and has received the approval of the lower Federal courts as essential to enable them to determine the equities of innocent owners and lienors, for the protection of whom the statute provides.

The mere recital of the foregoing results which would follow the construction contended for by petitioners evidences beyond question that Congress did not intend, when enacting Section 26, to make the jurisdiction of the court to adjudge a forfeiture of the vehicle depend upon a strict compliance with each and every provision of the statute.

The Government does not mean to assert that none of the provisions of Section 26 are jurisdictional. The requirement that the person arrested must be convicted before a forfeiture of the seized

property can be adjudged was obviously based upon the decision of this Court in the case of *Coffey* v. *United States*, 116 U. S. 436, 443–445, that if a person is acquitted of the charge of violating a law for the violation of which property found in his possession is declared by statute to be forfeitable, a libel to forfeit the property will not thereafter lie. The intent of Congress is also clear that a vehicle seized under Section 26 should not be subject to forfeiture if the owner satisfy the court that he was not responsible for the illegal use to which the vehicle had been put. The remaining requirements, however, are obviously mere directory provisions imposing upon the officer who discovers the violation certain duties a failure to perform which could not have been designed to prevent a forfeiture of the vehicle. That these requirements of Section 26 do not exclude the United States from all other remedies in such cases was held in the case of *United States* v. *Story*, 294 Fed. 517, wherein the Circuit Court of Appeals for the Fifth Circuit remarked (p. 519):

> The further contention is made that the remedy provided by section 26 is exclusive, and that, for that reason, the libel was properly dismissed. The remedy created in Section 26 applies by its terms only when a person is discovered in the act of transporting liquor in violation of the law, and is then and there arrested by the officer, and his vehicle and liquor seized, and he convicted, after being taken by the officer before a court

of competent jurisdiction. If this is the only remedy available to the government, in instances where the person in charge of the offending vehicles escape before arrest or absconds or dies after arrest, no condemnation of the vehicle would be possible, and a large number of cases would go unprovided for. Section 26 provides for the intervention of those having liens on the vehicle, not only upon the hearing in the criminal cause, but "in other proceeding brought for said purposes." The aim of section 26 was to provide a summary method of disposing of vehicles, in the cause in which the guilt of the owner was established by conviction, and in cases where that was possible. It can not embrace all cases and is therefore cumulative, not exclusive. *U. S.* v. *One Stephens Automobile* (D. C.), 272 Fed. 188.

Nor is the government required to adopt the summary method with respect to the vehicle seized, because the liquor seized with it was ordered destroyed in the criminal cause, any more than because the person arrested at the time of the seizure was convicted in the criminal cause. Destruction of the liquor and forefeiture of the vehicle are two rights of different nature and purpose, and the fact that they are both permitted to be pursued in the criminal cause, upon conviction of the person arrested, does not require that this be done. The destruction of the seized liquor is an incident to the conviction of the person arrested, and follows as a matter of course. Condemnation of the

> vehicle may depend upon questions of ownership and lien that require a hearing for the benefit of claimants.

And in *The G–883*, 6 F. (2d) 416, where it was contended that a motor boat could not be forfeited under Section 26 because the seizing officers had refused to release it under bond, the District Court for Rhode Island said:

> This boat was undoubtedly engaged in the illegal transportation of liquor under the National Prohibition Act. The only reason argued why she should not be forfeited therefor is that, after this cause of forfeiture was alleged, the government officers refused to release her on bond, as required by the Prohibition Act. It is contended that this refusal in effect estops the government from insisting on this charge. There is no provision in the statute which gives the refusal such effect, and no decision has been called to my attention supporting this contention.

Aside from their contention as to the effect of a seizure by police officers, petitioners do not clearly specify the particular requirements of Section 26, the failure to comply with which they assert deprived the District Court of jurisdiction to adjudge a forfeiture of the boat and accordingly justified that court in dismissing the Government's libel. It may be gathered from their brief, however, that the claim of lack of jurisdiction is based upon the grounds that the Federal officers were without right to take over the motor boat from the police

officers, because the boat at that time had no liquor on board and was not being used in transporting intoxicating liquor in violation of the National Prohibition Act, and because the Federal officers had not seized the liquor which had been transported on the boat; and that the Federal officers were also without right to arrest and proceed against the person in charge of the boat because those officers were not the ones who discovered the defendants in the act of illegally transporting intoxicating liquors in said boat. For the reasons above given, however, the Government urges that the requirements of Section 26 thus relied upon by petitioners are directory only and have no bearing upon the jurisdiction of the court to adjudge the forfeiture of a vehicle found transporting intoxicating liquor in violation of the National Prohibition Act.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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